No. 22346

# In the United States Court of Appeals for the Ninth Circuit

HARRY S. STONEHILL AND ROBERT P. BROOKS,
APPELLANTS

*v.*

UNITED STATES OF AMERICA, APPELLEE

*ON APPEAL FROM THE ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA*

## BRIEF FOR THE APPELLEE


MITCHELL ROGOVIN,
*Assistant Attorney General.*
LEE A. JACKSON,
JOSEPH M. HOWARD,
JOHN J. McCARTHY,
JEROME H. FRIDKIN,
*Attorneys,*
*Department of Justice,*
*Washington, D.C. 20530.*

Of Counsel:
WM. MATTHEW BYRNE, JR.,
*United States Attorney.*
LOYAL E. KEIR,
*Assistant United States Attorney.*

# INDEX





296-358—68——1

## CITATIONS

Cases:

# In the United States Court of Appeals for the Ninth Circuit

No. 22346

HARRY S. STONEHILL AND ROBERT P. BROOKS, APPELLANTS

*v.*

UNITED STATES OF AMERICA, APPELLEE

*ON APPEAL FROM THE ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA*

## BRIEF FOR THE APPELLEE

### OPINION BELOW

The Order Denying Motion to Suppress of the United States District Court for the Central District of California (R. 43–57)[1] is officially reported at 274 F. Supp. 420 (S.D. Calif.).

### JURISDICTION

On January 25, 1965, the United States of America instituted the suit in the Court below by filing a complaint which sought the foreclosure of federal tax liens securing federal income tax liabilities outstanding against Harry S. Stonehill and Robert P. Brooks for the years 1958 through 1961, inclusive. (R. 67.)

[1] "R." references are to the reproduced record.

The taxpayers raised by motion the issue that certain evidence which the Government had in its possession should be suppressed at the trial of these tax liabilities as being obtained by the United States in violation of the taxpayers' right under the Fourth Amendment to the Constitution. (R. 2.) The trial court severed and tried this issue apart from the other issues in the case on June 13, 1967. (R. 73.) On October 16, 1967, the trial court entered its interlocutory order denying the taxpayer's motion and deciding this issue for the Government. (R. 43.) Thereafter, the trial court on October 23, 1967, certified the order of October 16, 1967, pursuant to Section 1292(b) of Title 28 of the United States Code. (R. 58.) The taxpayers then petitioned for and obtained from this Court permission to prosecute an appeal from the order of October 16, 1967, pursuant to Section 1292(b) of Title 28 of the United States Code. (R. 60.) Jurisdiction is conferred on this Court by Section 1292(b) of Title 28 of the United States Code.

## QUESTIONS PRESENTED

1. Whether the trial court's finding that there was no participation by United States officials in the raids conducted by Philippine authorities on the businesses managed by the taxpayers is clearly erroneous.

2. Whether evidence obtained in violation of the taxpayers' rights under the Fourth Amendment can be used to impeach testimony and statements offered by the taxpayers in their tax returns and at the trial on the issue as to their liability for taxes.

3. Whether the taxpayers have standing to move to suppress evidence consisting of corporate documents obtained by Philippine officials in raids upon Philippine corporations of which the taxpayers were stockholders.

## CONSTITUTIONAL PROVISION INVOLVED

Constitution of the United States:

### Fourth Amendment

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants, shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

## STATEMENT

The instant action was instituted by the Government to foreclose tax liens and collect federal income tax assessments outstanding for the years 1958 through 1961 against the taxpayers Harry S. Stonehill and Robert P. Brooks. (R. 49–50.) During the tax years in question, the taxpayers resided in the Philippines, and the tax investigation which was the basis for the tax assessments involved in this suit, had its inception in the Philippines. (R. 43–57.) In the initial stages of the tax investigation a substantial amount of evidence, consisting of business records of the taxpayers and of various corporations of which the taxpayers were officers and stockholders, was obtained from the Philippine National Bureau of Investiga-

tion;[2] and that organization in turn obtained this evidence from raids upon the taxpayers' offices as well as upon the offices and premises of at least 16 Philippine corporations. (R. 47; Deft. Ex. AW.) The Supreme Court of the Philippines on June 19, 1967, ruled the applications for the search warrants, pursuant to which these raids were conducted, were invalid. (Deft. Ex. AW.)

The taxpayers moved[3] the trial court to suppress evidence obtained from the NBI on the grounds that the evidence was seized in raids in which the United States officials participated, and that the raids violated the taxpayers' constitutional rights under the Fourth Amendment. (R. 52–53.) The trial court severed this issue from the other issues present in this suit and brought this issue on for trial on June 13, 1967. (R. 73.) At this trial, the following facts were established.

In August of 1960, the federal income tax return of Harry S. Stonehill for the calendar year 1958 was sent for audit to Robert Chandler, who was attached to the United States Embassy in Manila, Republic of

[2] Hereinafter designated as the NBI.

[3] In support of this motion, the taxpayers filed an affidavit executed by counsel for the taxpayers. (R. 7–30.) The Government moved to strike this affidavit (R. 31), however, the trial court denied this motion without prejudice, inasmuch as it was severing this issue and holding a separate trial on it, stating that it would disregard all such hearsay testimony in trying this issue. (Reporter's trial transcript, p. 27; hereinafter, all references to the reporter's transcript of the trial beginning June 13 through June 23, 1967, will be designated by the notation "Tr.") Despite this ruling of the trial court, the brief for the appellants makes references to matters which are hearsay and are found only in that affidavit.

the Philippines. (R. 44; Tr. 70–71, 81.) Robert Chandler was the Internal Revenue Service Representative for the Far East, and his duties included liaison work with various foreign government agencies in his territory, as well as auditing returns of and collecting taxes from American taxpayers residing in his territory.[4] (Tr. 76–77, 439.) However, Mr. Chandler did not have the authority to initiate a fraud investigation; only a Special Agent for the Internal Revenue Service could initiate such an investigation. (Tr. 439.) With respect to the Stonehill income tax return for 1958 which was referred to him for audit, Mr. Chandler initially advised his office that this audit would not be assigned and undertaken, because of work load problems, until additional agents were assigned to his office. (R. 44; Tr. 81–85; Deft. Ex. A.)

Thereafter, nothing was done with respect to any audit of the taxpayers until December of 1961, when Menhart Spielman, vice-president of United States Tobacco Corporation, which was owned and controlled by the taxpayers, contacted Mr. Chandler and Robert Hawley, a Federal Bureau of Investigation agent attached to the American Embassy in Manila. (Pltf. Ex. 11, p. 1; R. 44–45; Tr. 97, 70–71.) Mr. Spielman made allegations concerning various alleged illegal activities of the taxpayers and he turned over approximately 100 documents to Mr. Hawley and Mr. Chandler. (R. 44–45; Tr. 110, 1203; Pltf. Ex. 11, pp.

[4] These duties included liaison work with the NBI, through which he met and became friendly with Colonel Lukban, the Acting Director of the NBI. (Tr. 71–72.)

3–4.) Mr. Chandler first met Mr. Spielman on December 18, 1961 (Tr. 93), and he soon concluded that Mr. Spielman's information indicated possible tax liabilities to be due from the taxpayers, and on December 22, 1961, he so advised his headquarters in Washington, D.C. (Pltf. Ex. 11.) However, on December 22, 1961, Mr. Chandler also advised his headquarters that any tax investigation was beyond his office's capabilities, and he recommended that a team of agents be assigned to this matter. (Pltf. Ex. 11.)

Although Mr. Chandler continued to meet frequently with the informer for about 26 days after December 18, 1961 (Tr. 112, 126, 444–454, 466–467), he did nothing but collect information from Mr. Spielman (Tr. 112–128) and continued to ask his headquarters in Washington for help (Tr. 129–130). Indeed, on January 10, 1962 (Deft. Ex. E) and February 12, 1962 (Deft. Ex. F), Mr. Chandler repeated to his headquarters his requests for help, and even stated that it would be better not to undertake this tax investigation than to attempt it with an inadequate staff (Deft. Ex. E). As of February 13, 1962, it still had not been decided whether or not to assign personnel to conduct this tax audit (Deft. Ex. F), and in fact this audit was not assigned to anyone until after the date of the raids on March 3, 1962 (Tr. 468–469).[5]

[5] From December 18, 1961, the date on which Mr. Chandler met the informer Spielman until March 3, 1962, the date of the raids by the Philippine authorities, Mr. Chandler was not assigned nor did he assign the investigation of the taxpayers' liabilities (Tr. 468–469, 1179); rather, he was trying to keep

As to the first meetings between Mr. Chandler and Mr. Spielman, these either took place at Mr. Spielman's house or Mr. Chandler's office (Tr. 112–113, 444–454, 466–467), and, at these meetings, Spielman expressed a fear for his personal safety (Tr. 141, 472). Mr. Hawley tried for some time to have Mr. Spielman turn over his information to Colonel Lukban, of the NBI, as the information concerned violations of Philippine laws and because the Philippine authorities could give Mr. Spielman the protection he sought. (Tr. 1101–1102, 1205, 1210–1213.) Finally, Messrs. Chandler and Hawley persuaded Mr. Spielman to relate his information to Colonel Lukban, which he did on January 27, 1962, at the United States Embassy. (Tr. 465, 1203–1205, 1210–1213; R. 45.)

This was not the first interest that the Philippine law enforcement authorities had in the taxpayers however. Between Christmas of 1961 and the first week of January of 1962, Colonel Lukban contacted Mr. Chandler and advised that he was aware that Mr. Chandler had some information relative to Mr. Stonehill, and he requested it; Mr. Chandler, however, refused to divulge it because of the informant's desire for anonymity. (Tr. 463–465, 1101, 1204.) In fact, former Philippine Secretary of Justice Diokno has testified that the raids in question were made solely for the purpose of a Philippine investigation which

---

the informer available and cooperative and to keep abreast of the Philippine law enforcement authorities' (NBI's) actions with respect to the informer and the taxpayers.

had begun years earlier and therefore prior to Mr. Chandler meeting the informer. (Pltf. Ex. 12, pp. 14, 38, 52, 145.)

After Mr. Spielman was introduced to Colonel Lukban of the NBI, there occurred some 10 or 12 meetings at Mr. Chandler's house (Tr. 146); some of these meetings were between officers of the NBI and Mr. Spielman, however, Philippine officials were not present at many of these meetings (Tr. 273–274). Mr. Spielman requested that the meetings take place at Mr. Chandler's house (Tr. 148) because being fearful of his life,[6] he refused to be seen entering the NBI headquarters, and Colonel Lukban felt that the United States Embassy was not appropriate (Tr. 139–141, 471–472). Mr. Chandler consented to this (Tr. 472), as he was friendly with Colonel Lukban. (Tr. 72.) With respect to these meetings, Secretary Diokno testified that Colonel Lukban was trying to keep Mr. Spielman's movements and whereabouts secret. (Pltf. Ex. 12, p. 22.) Mr. Chandler was not at all of the meetings at his house (Tr. 997–998) and those at which he was present, he described as basically being between the informer Spielman and the NBI (Tr. 149, 998).

At the beginning of February of 1962, the then Secretary of Justice for the Republic of the Philippines, Jose Diokno, became involved with the investigation of the taxpayers by the NBI (Pltf. Ex. 12, p. 15) and he met with Mr. Chandler and Mr. Hawley

[6] Mr. Spielman had already received one severe beating. (Pltf. Ex. 11, p. 3.)

to ascertain what interest the United States had in the taxpayers and their activities (Tr. 979). Shortly thereafter, Secretary Diokno requested Mr. Hawley to help arrange a meeting between himself and the then Attorney General of the United States, Robert F. Kennedy, who was making a tour of the Far East; Mr. Chandler helped Mr. Hawley in this matter by giving Secretary Diokno the name of the Hong Kong police official in charge of security for Mr. Kennedy's party in Hong Kong. (Pltf. Ex. 12, pp. 60–63.)

Secretary Diokno flew to Hong Kong and saw an aide of Attorney General Kennedy, a Mr. Seigenthaler, on February 11, 1962. (Pltf. Ex. 12, pp. 24–25; Deft. Ex. AZ.) At this meeting, Secretary Diokno requested help of the United States in investigating the taxpayers; specifically, he requested that the services of some tobacco experts be made available to him in investigating the activities of the taxpayers' Philippine tobacco companies' activities. (Pltf. Ex. 12, pp. 25–26, 61–62.) No help was requested of Secretary Diokno by the United States at this meeting (Pltf. Ex. 12, pp. 25–26, 44), or by Mr. Chandler at any meeting (Pltf. Ex. 12, p. 44). Further, Secretary Diokno has admitted that the help he requested of the United States was never provided. (Pltf. Ex. 12, pp. 26, 169.) Around the time of the Hong Kong trip by Secretary Diokno, Secretary Diokno decided to have the taxpayers arrested and their companies' business premises raided in connection with the NBI's investigation. (Pltf. Ex. 12, pp. 26–31.) Mr. Chandler learned of Mr. Diokno's decision with respect to the proposed raids

and he requested that no such action be taken but that the status quo be maintained until personnel from the Internal Revenue Service were assigned to this matter on behalf of the United States and until such personnel had an opportunity to evaluate this matter. (Tr. 986.) This request however was disregarded and the raids were conducted on March 3, 1962, prior to the arrival of Special Agent Sterling Powers on March 8, 1962, who was to be in charge of this investigation for the United States. (Tr. 468–469, 1179.) After this decision by Secretary Diokno, and in advance of the raids, Mr. Chandler did endeavor to secure from Colonel Lukban permission to see records seized in the raids. (Tr. 989.)

On the night of March 2, 1962, Mr. Chandler was contacted by an aide of Colonel Lukban who requested that he see Colonel Lukban at his home. (Tr. 1006.) Upon reaching Colonel Lukban's house, he found a large number of NBI personnel there speaking the Tagalog language. (Tr. 1006–1007.) Mr. Chandler was shown a paper described to him as a warrant [7] and his comments were solicited; Mr. Chandler has testified that he had never seen any search warrants before and that he remarked that it looked all right to him. (Tr. 1007.) After so testifying at the trial herein, Mr. Chandler was shown a copy of one of the search warrants (Deft. Ex. N) and the applications for the search

[7] At this time, no search warrants had even been issued as application for the warrants were made on the morning of March 3, 1962. (Tr. 857–858.) Mr. Chandler also testified that it appeared to him that the warrants had already been prepared when he arrived at Colonel Lukban's house. (Tr. 319.)

warrants, and he testified that these were not the documents nor the type of documents that were shown to him that night. (Tr. 1007–1008, 1010–1011.) Mr. Chandler did not know what premises were going to be raided or how many search warrants were going to be issued (Tr. 1010); however, out of curiosity, Mr. Chandler inquired as to whether the NBI intended to include some premises at the Army-Navy Club, rented by a Karl Beck,[8] in the raid, as he thought any such raid should include those premises. (Tr. 1009–1010.) The basis of this question was the information furnished to Mr. Chandler and the NBI by the informer Spielman. (Tr. 318–319.) Whereupon, it appears that the Army-Navy Club premises were included in the raid. Mr. Chandler was present at Colonel Lukban's house on the night of March 2, 1962, for not more than 30 minutes (Tr. 1008), and he has emphatically denied that he dictated or gave any written instructions to any NBI personnel at Colonel Lukban's house just prior to the raid (Tr. 328–330), or that he participated in the planning of the raids (Tr. 320), or that he composed the language of any search warrants or

[8] Mr. Beck was an officer of the Industrial Business Management Corporation, a Philippine corporation of which the taxpayers were stockholders. (Tr. 665–666, 691.) Mr. Beck, in his testimony in this suit, alleged that the room in the Army-Navy Club was rented by Mr. Stonehill in his [Beck's] name to store papers of Mr. Stonehill. (Tr. 679.) However, in a suit in the Philippines, Mr. Beck filed an affidavit (Pltf. Ex. 7; Tr. 724–725), in which he stated that he [Beck] rented the room as a place of rest and personal study. (Pltf. Ex. 7; Tr. 698.) It should further be noted that these premises were seized under a warrant directed at several corporations, including Industrial Business Management Corporation (Pltf. Ex. 7, p. 2) of which Mr. Beck was an employee.

applications for search warrants (Tr. 315–316). Finally, Mr. Chandler testified that he did not answer any questions of the NBI team leaders concerning these raids at Colonel Lukban's house (Tr. 308–309), and from his observation, their presence at Colonel Lukban's house was of a social nature (Tr. 305–306), although NBI Agent Nocon was typing (Tr. 1007); and he never did get an explanation from Colonel Lukban as to his request for Mr. Chandler to come to his house (Tr. 1008). Mr. Chandler emphatically stated that the only aid he ever gave the Philippine officials at any time was to relay information from the informer Spielman to them. (Tr. 320.)

The raids on the taxpayers and the corporations in which they had an interest were commenced on Saturday, March 3, 1962, at 1:00 p.m. (Tr. 396, 909), at which time the taxpayers were arrested (Tr. 908) and 200 NBI agents (Tr. 906) simultaneously raided (Tr. 864; Pltf. Ex. 12, p. 29) the business offices of the taxpayers and 17 different corporations (R. 45). Secretary of Justice Diokno testified that he made the decision concerning this raid and that the NBI made all the preparations for this raid. (Pltf. Ex. 12, pp. 27–40, 46–49.) This testimony is corroborated by the taxpayers' witness Major Del Rosario, who was Secretary Diokno's aide. (Tr. 902.) Further, Secretary Diokno testified that he personally cleared this investigation of the taxpayers with the President of the Philippines and that he received permission to proceed from that official. (Pltf. Ex. 12, pp. 45–46, 93–94.) Secretary Diokno testified that these raids were

not conducted for any purposes of the United States Government but solely to uncover violations of Philippine law (Pltf. Ex. 12, pp. 52–53), and that he received no requests from the United States Government or Mr. Chandler with respect to the raids (Pltf. Ex. 12, pp. 43–44). Finally, Secretary Diokno stated that the raids commenced at about noon to 1:00 p.m. (Pltf. Ex. 12, p. 39; Tr. 909) and that at 5:30 p.m., he had received a report as to what the raids had turned up (Pltf. Ex. 12, p. 40); thereafter, he and Colonel Lukban visited the various raided premises, and he did nothing further on this matter after 9:00 or 10:00 p.m. (Pltf. Ex. 12, pp. 41–42).

Mr. Chandler, together with two employees from his office, Mr. Ragland[9] and Mr. Reynolds, at 1:00 p.m., on March 3, 1962, went to a parking lot across the street from the main NBI headquarters to await the conclusion of the raids and to see if they could obtain from the NBI any records which were seized. (Tr. 1012–1013, 1136.) They remained there or at the NBI arson squad building until approximately 10:00 p.m. that night without any communication with the NBI, although Mr. Chandler tried to telephone Colonel Lukban several times. (Tr. 1017–1018.) At approximately 5:00 p.m., on March 3, 1962, Messrs. Chandler, Ragland and Reynolds read in the evening

[9] Mr. Ragland was an Internal Revenue Agent who had been sent to the Philippines there to work under and assist Special Agent Sterling Powers who was to handle this tax investigation for the United States. (Tr. 1183–1184.) Mr. Ragland arrived in the Philippines on February 26, 1962 (Tr. 1133), while Mr. Powers did not arrive until March 8, 1962 (Tr. 1179).

newspaper that the taxpayers had been arrested and that various businesses with which they had been associated had been raided. (Tr. 1015–16.) Finally, at about 10:00 p.m., Mr. Chandler talked to Colonel Lukban on the telephone and Colonel Lukban requested him to come over to his office. (Tr. 1017–1018.) Messrs. Chandler, Ragland and Reynolds went to Colonel Lukban's office and there they saw a large volume of records which, they were told, came from the raided premises. (Tr. 401, 1018–1019, 1139–1140.) They were given to understand, at that time by Colonel Lukban, that the raids had been accomplished although the NBI remained in possession of many of the raided premises. (Tr. 400–401.) Indeed, the NBI retained possession of many of the corporate premises for several years, including the premises of United States Tobacco Company. (Tr. 609–611.) Mr. Chandler, at this time, requested permission from Colonel Lukban to copy the seized documents, but this request was refused and he was told that the seized documents and records would be made available to them only after said records had been examined, catalogued, and inventoried by the NBI. (Tr. 1019, 1143, 425–426.)

Messrs. Chandler, Ragland and Reynolds were present in Colonel Lukban's office for approximately one-half hour. (Tr. 1144.) While they were there, an NBI agent entered and told Colonel Lukban that he had seized a large volume of corporate records (Tr. 1142, 1019–1020) at a warehouse of the United States Tobacco Corporation and he advised Colonel Lukban that the quantity seized was too large to bring back

to the NBI office and he requested the help of an accountant to identify what records were significant from an accounting point of view. (Tr. 1142–1143, 1019–1021.) Whereupon, Colonel Lukban asked Mr. Chandler to go to the warehouse and help the NBI agents there, and Mr. Chandler agreed. Messrs. Chandler, Reynolds and Ragland were taken to the warehouse by an NBI agent and they found there a large quantity of old corporate records in a storage area (Tr. 1019–1022, 1142–1147),[10] they pointed out an old general ledger of the corporation and some supporting books as being the more significant records from an accounting point of view and they left. (Tr. 1019–1022, 1146–1148.) They made no detailed examination of these records, they took no records with them, they do not know what the Philippine authorities did with them, and they have never seen these old records since. (Tr. 1147–1149.) Further, they were at this warehouse for only one-half hour, beginning at approximately 11:00 p.m., on March 3, 1962. (Tr. 1024, 1149.) Upon leaving the warehouse of the United States Tobacco Corporation, Mr. Chandler drove by the main

[10] This warehouse and the records therein were in the custody of the NBI when Messrs. Chandler, Ragland and Reynolds saw the records (Tr. 339, 404), and the records remained in the NBI custody for two years (Tr. 610–611). Further, when Mr. Chandler arrived at the warehouse, the records were not in sealed boxes but were in great disarray on the floor (Tr. 1022, 1146) and obviously had been examined by the NBI agents as they were originally in sealed boxes on shelves. (Tr. 657.) Even the taxpayers' own witness, Mrs. Zubiri, admits that the NBI agents broke the cartons containing these records and examined them prior to the arrival of Mr. Chandler. (Tr. 657–658.)

office of that company several blocks away. Upon passing the main office, he parked his car, and leaving Mr. Ragland and Mr. Reynolds, he approached the NBI agent in charge of the NBI team which had custody of these corporate premises. (Tr. 1150, 1024–1025.) He asked the agent if he had found the record storage room which Mr. Spielman had advised both Mr. Chandler and the NBI about; the NBI agent did not seem to know about it and he requested Mr. Chandler to point this area out. (Tr. 1025.) Mr. Chandler stepped into this business office building and pointed out generally the location of the record storage room and left. (Tr. 1025.) Mr. Chandler did not enter the storage area or examine any records there (Tr. 1025–1026); and he was on the corporate premises for approximately five minutes[11] (Tr. 1026). After Mr. Chandler left, the NBI team did enter the record storage area and they found there stock inventory records of the United States Tobacco Corporation. (Tr. 614–619.) Upon leaving the main office of this company, Messrs. Chandler, Ragland and Reynolds proceeded home. (Tr. 1034–1035.)

On Sunday, March 4, 1962, Mr. Chandler again contacted Colonel Lukban and requested that he make seized records available, and again Colonel Lukban refused saying that the seized records would be made available for copying but that Mr. Chandler would

[11] It should be noted that this visit to the warehouse and main office of the United States Tobacco Corporation occurred at least eight hours after these premises had been seized by the NBI and after Colonel Lukban advised that the raids had been accomplished.

have to wait until the NBI had gone over the records and had inventoried them. (Tr. 425–426.) On the afternoon of March 4, 1962, Mr. Chandler, Colonel Lukban, Secretary Diokno, and other NBI personnel attended a party at Mr. Hawley's house. (Tr. 426–427.) Counsel for the taxpayers have labeled this party a victory celebration over the success of the raids. (App. Br. 15.) Mr. Hawley has testified in his deposition in this proceeding that this party was arranged before he knew of the raids and was in honor of two NBI agents who had been selected to go to a Federal Bureau of Investigation School in the United States. (Hawley Dep., pp. 250–253, 266–271, 311.)

On Monday, March 5, 1962, Messrs. Ragland and Reynolds went to the NBI headquarters and some of the seized records were made available to them for the first time; but they were not given free access to all of the records seized. (Tr. 1153.) On Thursday, March 8, 1962, Special Agent Sterling Powers, who was sent from the United States to conduct any investigation, arrived in Manila. (Tr. 1179.) Mr. Powers examined the information divulged by the informer Spielman and copies of such records as had been made available by the Philippine authorities, and on March 12, 1962, he made an application to his office to have a fraud investigation of the taxpayers opened. (Tr. 1181–1184.) Two weeks later, his office in Washington, D.C., opened a fraud investigation of the taxpayers. (Tr. 1184.) Messrs. Powers and Ragland continued to inspect and copy the seized documents for a number of months thereafter. (Tr. 1183.)

The only other significant fact following the raids was the deportation of the taxpayers from the Philippines as a result of the investigation of them by the Philippine authorities. (Pltf. Ex. 12, pp. 54–55: R. 45; Tr. 1215.)

Upon analyzing these facts, the trial court found that: (1) The Philippine authorities were conducting an investigation of the taxpayers prior to the informant Spielman being referred to them by the United States agents (R. 45, 52): (2) the Philippine authorities decided upon holding the raids (R. 45–46, 52), and no United States official requested or instigated these raids (R. 52) but, rather Mr. Chandler expressed disapproval of the raids (R. 45–46, 52): (3) that no official of the United States was a party to or participated in the raids conducted by the Philippine authorities, although they knew that the raids would be conducted (R. 52–53); and (4) the raids conducted by the Philippine authorities were illegal under Philippine law (R. 52). The trial court then concluded that the illegality of the acts of the Philippine law enforcement authorities did not preclude the use by the United States of the evidence secured in those raids by the Philippine authorities and subsequently turned over to the United States. (R. 56–57.)

In this appeal, the taxpayers are contending that these findings of fact are erroneous and should be set aside; and, further, that the trial court's order should be reversed whether or not United States agents participated in the illegal raids.

## SUMMARY OF ARGUMENT

Neither the Fourth Amendment nor the exclusionary rule of evidence employed as a sanction to the Fourth Amendment is applicable to the acts of foreign officials. *Brulay* v. *United States,* 383 F. 2d 345 (C.A. 9th), certiorari denied, 389 U.S. 986; *Birdsell* v. *United States,* 346 F. 2d 775 (C.A. 5th), certiorari denied, 382 U.S. 963; Cf. *Burdeau* v. *McDowell,* 256 U.S. 465; *Wentz* v. *United States,* 244 F. 2d 172 (C.A. 9th), certiorari denied, 355 U.S. 806. The Fourth Amendment could apply to raids by foreign officials or third parties only if federal agents so substantially participated in the raids so as to convert the raids into joint ventures between the United States and the foreign officials or third persons. Cf. *Byars* v. *United States,* 273 U.S. 28; *Lustig* v. *United States,* 338 U.S. 74; *Symons* v. *United States,* 178 F. 2d 615 (C.A. 9th), certiorari denied, 339 U.S. 985; *Sloane* v. *United States,* 47 F. 2d 889 (C.A. 10th).

In order to establish that there has been substantial participation by the United States, three facts must be shown: (1) The presence of a federal agent at the time and place of the raid; (2) the examination and selection by the federal agent, prior to seizure, of the evidence to be seized at the raid according to the suitability of the evidence for use in a federal prosecution; and (3) the possessing of the seized evidence by the federal agent at the time and place of the raid, and his retention of exclusive possession of the seized evidence for use in a subsequent federal prosecution.

Cf. *Byars* v. *United States, supra; Lustig* v. *United States, supra; Symons* v. *United States, supra; Sloane* v. *United States, supra; Myers* v. *United States,* 49 F. 2d 230 (C.A. 4th), certiorari denied, 283 U.S. 866; *Thompson* v. *United States,* 22 F. 2d 134 (C.A. 4th); *Shurman* v. *United States,* 219 F. 2d 282 (C.A. 5th), certiorari denied, 349 U.S. 921; *United States* v. *Evans,* 179 F. Supp. 834 (Md.); and *United States* v. *Brown,* 151 F. Supp. 441 (E.D. Va.).

The trial court's findings that no federal agents requested, instigated, or participated in the raids conducted by the Philippine authorities should not be set aside as they are not clearly erroneous but, rather, these findings are supported by clear and convincing evidence. Neither the fact that federal agents knew beforehand that Philippine authorities intended to raid premises owned by the taxpayers and certain corporations managed by the taxpayers nor the fact that federal agents, after reading of the raids in the newspapers, visited two corporate premises seized in the raids 10 hours earlier, amounts to any participation in the raids. The facts remain that the raids were the culmination of an investigation begun by the Philippine authorities well in advance of any contact between Philippine and United States officials relative to this case; no United States official was present at the time the raids were effected; and no evidence was secured from any seized premises by any United States

official for use in any federal investigation; rather, federal officials obtained evidence from Philippine officials days after the raids and after the Philippine officials had inventoried the records which were seized. Further, only those records were turned over to the United States officials which the Philippine authorities decided in their discretion to turn over. Accordingly, it is submitted that the trial court's order denying the motion to suppress should be affirmed.

It is further submitted that, if it is decided that the evidence in question should be suppressed in any United States criminal prosecution, this evidence should be admissible in this civil proceeding to impeach the statements of the taxpayers as contained in their federal tax returns and in the testimony which they are expected to offer at the trial of their tax liabilities.

Finally, it is submitted that, if it is decided this evidence is suppressible in this civil suit, this matter should be remanded to the trial court with the instructions to try the issue of the standing of the taxpayers to suppress the various items of evidence in the Government's possession, as the trial court specifically deferred this issue until after it decided the issue as to whether there was any participation by the United States in the raids conducted by the Philippine officials. (Tr. 722.)

## ARGUMENT

**I. The Fourth Amendment does not apply to a raid by foreign officials unless an agent of the United States so substantially participates in the raid as to convert the raid into a joint venture between the United States and the foreign officials. As used in this sense, substantial participation means: That the federal agent is present at the initiation of the raid and seizure, examines and sifts articles turned up by the search, and, in his discretion, decides on the seizure of evidence and his retention of it for use in a subsequent federal prosecution**

The Court of Appeals for the Ninth Circuit in *Brulay* v. *United States,* 383 F. 2d 345, certiorari denied, 389 U.S. 986, held that the Fourth Amendment, *supra,* and the exclusionary rule of evidence employed to enforce it has no application to raids and seizures by foreign officials, stating (p. 348):

> The Fourth Amendment is directed at the Federal Government and its agencies. Fourth Amendment rights are protected from state encroachments by the Fourteenth Amendment which reaches the states and their agencies. The Fourth Amendment does not, by its language, require the exclusion of evidence and the exclusionary rule announced in Weeks is a court-created prophylaxis designed to deter federal officials from violating the Fourth Amendment. Neither the Fourth nor the Fourteenth Amendments are directed at Mexican officials and no prophylactic purpose is served by applying an exclusionary rule there since what we do will not alter the search policies of the sovereign Nation of Mexico.

See Also: *Birdsell* v. *United States,* 346 F. 2d 775 (C.A. 5th), certiorari denied, 382 U.S. 963; Cf. *Wentz* v. *United States,* 244 F. 2d 172 (C.A. 9th), certiorari denied, 355 U.S. 806.

Prior to the decisions of the Supreme Court in *Mapp* v. *Ohio,* 367 U.S. 643, and *Elkins* v. *United States,* 364 U.S. 206, wherein the Supreme Court held that the Fourth Amendment was incorporated in the Fourteenth Amendment and therefore applicable to state agencies, it was pertinent to inquire as to whether federal officials so substantially participated in a raid by state officials so as to convert the raid into a joint venture between the state and federal officials, and therefore subject to the provisions of the Fourth Amendment. *Byars* v. *United States,* 273 U.S. 28, and *Lustig* v. *United States,* 338 U.S. 74. The essentials of that inquiry are equally pertinent in determining whether federal officials so substantially participated in a raid by foreign officials so as to convert that raid into a joint venture between the United States and the foreign government and therefore subject to the provisions and sanctions of the Fourth Amendment.

A close reading of the cases involved in this inquiry reveals that the following three elements are neces-

sary to convert a raid by a third party into a joint venture with the United States:

> (1) The presence of a federal agent at the time and place of the raid;
>
> (2) the examination and selection by the Federal agent, prior to seizure, of the evidence to be seized at the raid according to the suitability of the evidence for use in a federal prosecution; and
>
> (3) the possession of the seized evidence by the federal agent at the time and place of the raid, and his retention of exclusive possession of the seized evidence for use in a subsequent federal prosecution.

*Byars* v. *United States, supra; Lustig* v. *United States, supra; Sloane* v. *United States,* 47 F. 2d 889 (C.A. 10th); *Symons* v. *United States,* 178 F. 2d 615 (C.A. 9th), certiorari denied, 339 U.S. 985; *Myers* v. *United States,* 49 F. 2d 230 (C.A. 4th), certiorari denied, 283 U.S. 866; *Shurman* v. *United States,* 219 F. 2d 282, certiorari denied, 349 U.S. 951; *United States* v. *Evans,* 179 F. Supp. 834 (Md.); and *United States* v. *Brown,* 151 F. Supp. 441 (E.D. Va.).

The Supreme Court, in *Byars* v. *United States, supra,* held that a state search and seizure was the act of the United States and violative of the Fourth Amendment because of the substantial participation in the search and seizure by a federal agent. In reaching this result, the Supreme Court recognized that *mere* participation in the state search by the federal officer would not render the search an act of the

United States and involve the Fourth Amendment, stating (p. 32):

> While it is true that the *mere* participation in a state search of one who is a federal officer does not render it a federal undertaking, the court must be vigilant to scrutinize the attendant facts with an eye to detect and a hand to prevent violations of the Constitution by circuitous and indirect methods.

However, the Court held that the federal agent had gone beyond *mere* participation, stating (pp. 32–33):

> The attendant facts here reasonably suggest that the federal prohibition agent was not invited to join the state squad as a private person might have been, but was asked to participate and did participate as a federal enforcement officer, upon the chance, which was subsequently realized, that something would be disclosed of official interest to him as such agent. The house to be searched contained only four rooms—a dining room, a kitchen, and two bedrooms. We are not prepared to accept the view that the local officer thought a force of four men would be insufficient to search these limited premises; and it is significant, in that connection, that he did not ask his superior officer for additional help, but inquired particularly for Adams, who, he knew, was the federal agent. *The stamps found were not within the purview of the state search warrant, nor did they relate in any way to a violation of state law. Those found by the* [*federal*] *agent were held by him as of right and without question, those found by the state officer were considered by both the local officer in charge and the federal agent as things which*

> *concerned the federal government alone and then and there were surrendered to the exclusive possession of the federal agent*—a practical concession that he was present in his federal character. *We cannot avoid the conclusion that the participation of the agent in the search was under color of his federal office and that the search in substance and effect was a joint operation of the local and federal officers.* In that view, so far as this inquiry is concerned, the effect is the same as though he had engaged in the undertaking as one exclusively his own. [Emphasis added.]

After reviewing these facts,[12] which indicate the presence of the three essential prerequisites listed above, the Court noted (p. 33):

> Similar questions have been presented in a variety of forms to the lower federal courts, but nothing is to be gained by attempting to review

[12] In the *Byars* case, *supra*, the following salient facts should be specifically noted: (1) The federal agent accompanied the four state agents at the outset of the raid; and since only four rooms were to be searched, the help of the federal agent was not needed by the state officers for purposes of the state's case; (2) the federal agent searched some of the premises himself (kitchen); (3) the federal agent found some and selected all the evidence seized solely because it related to a possible federal offense, knowing it could not relate to any state offense and was outside the purview of the state search warrants; (4) the state agents, at the time of the raid, gave everything they found to the federal agent for his critical examination as to its possible use in some possible subsequent federal proceedings; (5) any evidence the federal agent found at the time of the raid or that the state agents gave him at the time of the raid, and which he deemed useful in a federal case, he kept in his exclusive possession and carried away from the scene of the raid, with the state authorities never seeing or possessing such evidence again.

> the decisions *since each of them rests, as the present case does, upon its own peculiar facts* * * *. [Emphasis added.]

The acts of participation must be such that the search and seizure can be said to be a joint operation or joint venture between the United States and the state or foreign government. That is, some facet of the search must be performed by the federal agent, not for the state's purposes, but for federal purposes. Whether the search does become a joint venture can be determined only by a comparison of what the federal agent did in the search and seizure with the totality of acts done in the search and seizure. In *Byars,* the Court concluded that the only reason the federal agent was present at the time of the raid was to select that evidence which was subsequently introduced in the federal prosecution. Further, the federal agent selected certain evidence according to the sole criterion of its use in a federal prosecution, and he kept exclusive possession of this evidence at all times.

Subsequently, the Supreme Court reaffirmed the *Byars* doctrine in a counterfeiting case captioned *Lustig* v. *United States,* 338 U.S. 74, stating (p. 79):

> The decisive factor in determining the applicability of the *Byars* case is the *actuality of a share by a federal official* in the total enterprise of *securing* and *selecting* evidence by other than sanctioned means. It is immaterial whether a federal agent originated the idea or joined in it while the search was in progress. So long as he was in it before the object of the search was completely accomplished, he must be deemed to

> have participated in it * * *. *Evidence secured through such federal participation is inadmissible* * * *. [Emphasis added.]

In that case, the Court defined the duration of the search as follows (p. 78):

> Search is not completed until effective appropriation, as part of an uninterrupted transaction, is made of illicitly obtained objects [evidence] for subsequent proof of an offense.

In holding the federal officer to have participated in the state raid so as to convert it into a joint venture between the federal and state governments, the Supreme Court summarized the facts of participation in *Lustig,* as follows (p. 78):

> *Greene's selection of the evidence deemed important for use in a federal prosecution for counterfeiting, as part of the entire transaction in Room 402, was not severable, and therefore was part of the search carried on in that room.* The uncontroverted facts show that before the search was *concluded* Greene was called in, and although he himself did not help to empty the physical containers of the seized articles he did share in the critical examination of the uncovered articles as the physical search proceeded. It surely can make no difference whether a state officer turns up the evidence and hands it over to a federal agent for his critical inspection *with the view to its use in a federal prosecution,* or the federal agent himself takes the articles out of a bag. [Emphasis added.]

Further, the Supreme Court stated (p. 79):

> Though state officers preceded Greene in illegally rummaging through the bags and bureau drawers in Room 402, they concerned themselves especially with turning up evidence of violations of the federal counterfeiting laws after Greene joined them. He was an expert in counterfeiting matters and had a vital share in sifting the evidence as the search proceeded. *He exercised an expert's discretion in selecting or rejecting evidence that bore on counterfeiting.* [Emphasis added.]

As for the evidence actually seized in the state raid, it was apparently turned over to the federal agent by the state officer at the very scene of the search or shortly thereafter, as the Supreme Court noted (p. 77):

> After the search was completed, Greene and the city police gathered up the articles revealed by the search and carried them to the police station. Some of the articles were given to Greene before he left Room 402 [the searched premises]; all were eventually turned over to him.

Thus, in *Lustig,* the three prerequisites for substantial participation are present, as a facet of the search itself was actually by the federal agent for the sole benefit of the United States; and the federal agent actually selected the evidence seized, took possession of it at the time of the search and retained the evidence in his exclusive possession until it was subsequently used in a federal prosecution.

296-358—68——3

In *United States* v. *Evans,* 179 F. Supp. 834 (Md.), the court analyzed the *Lustig* case as follows (pp. 841–842):

> As I read the *Lustig* case the decisive factor was whether *Greene* [*the federal agent*] *had actively and effectively participated in making the search for the incriminating counterfeiting evidence which he was best qualified to do as an expert;* and the holding in the case was that on the facts stated he had so participated while the search was in progress and before it had been concluded. As the decision turned on the judicial view of the evidence itself, it was, as the opinion notes, stated with "particularity", and I think in this connection it is appropriate as emphasis of that point to note that on the same evidence there was a strong minority view. Of course this does not in any way minimize the weight of the majority opinion but I think it does emphasize the necessary particularity of the evidence in the case, and requires a careful critical comparison of the facts in the instant case with those in the *Lustig* case. I have therefore above endeavored to state the facts in the instant case with the same degree of particularity for comparison with those in the *Lustig* case. [Emphasis added.]

After so analyzing the *Lustig* case, the court in the *Evans* case held there was no participation by the federal agent in the illegal state search and seizure even though the federal agent took possession of the evidence at the scene of the raid, stating (p. 842):

> With this comparison in mind, the decisive factor in the instant case is *that the search by the state police had been completed before*

> *Mueller* [*the federal agent*] *arrived on the scene* [*of the search*] *and took any action in the matter.* [Emphasis added.]

This Court in *Symons* v. *United States,* 178 F. 2d 615, certiorari denied, 339 U.S. 985, held that evidence obtained in a state raid could be used in a federal prosecution even though federal officers took possession of some of the evidence at the scene of the raid. The Court held that there was no violation of the Fourth Amendment under the rationale of the *Byars* and *Lustig* cases, *supra,* as the evidence, consisting of marijuana, had been effectively seized by state officials in a state search, albeit the evidence was then turned over to federal officials at the very scene of the search. The decisive factor was that no federal official was present and helped to sift and select evidence with a view towards a federal prosecution while the seizure of evidence was taking place.

The United States District Court for the Eastern District of Virginia, in *United States* v. *Brown,* 151 F. Supp. 441, discussed the Supreme Court's rationale of participation as set forth in *Byars, supra,* and held that a federal agent did not participate in an illegal state search and seizure merely because he was present at the scene and at the time of the state search. In the *Brown* case, the District Court cited *Myers* v. *United States,* 49 F. 2d 230 (C.A. 4th), certiorari denied, 283 U.S. 866, and *Thompson* v. *United States,* 22 F. 2d 134 (C.A. 4th), and language used in those appellate court cases to the effect that the mere presence of a federal agent at an illegal state search and seizure did not render him a participant in the search

and seizure so as to preclude the admissibility of the evidence seized, but that the real inquiry was whether, under the facts, the search was in truth a proceeding by the state.

It should also be noted that the acts of a federal agent in advising state or foreign officials as to violations of their law, or giving them other information or advice with respect to a prospective state or foreign raid, is not tantamount to participation by the federal government in that raid. In *Sloane* v. *United States,* 47 F. 2d 889, the Tenth Circuit held that a federal agent did not so substantially participate in a state search and seizure so as to convert the seizure into one by the United States, even though the federal agent gave the state officials the information which led to the search and seizure and secured aid for the state official making the search and seizure. In so holding, the court stated (P. 890):

> While the instant case comes very close to the line, we are not convinced that such a purpose actuated Whiteneck [the federal agent] when he gave the information to Eads [the state official]. By passing on the information, he may have provoked the action of the state officers, but he neither ordered nor directed the search. Eads did not act under the order or direction of Whiteneck, but on his own initiative. The state officers were not acting for the federal officers nor solely for the purpose of aiding in the enforcement of the federal law. They were performing their normal duties as state officers.

The Fifth Circuit in *Shurman* v. *United States,* 219 F. 2d 282, certiorari denied, 349 U.S. 921, held that

a state search and seizure made solely on the basis of information furnished the state by a federal official was not a search and seizure by the federal government, even though the evidence seized was subsequently turned over to the federal government and used in a federal prosecution. In reaching this result, the court commented on the *Sloane* case as follows (p. 288):

> The reasoning of the *Sloane* case seems correct. We cannot denounce such exchange of information between law enforcement agencies where no attempt is otherwise shown to do indirectly what is prohibited to do directly. Furthermore, it should be noted that the basis of our holding herein that what was done by the state officer was improper, is not that there was not probable cause for the search, but merely a failure to obtain a search warrant when it might well have been obtained, or to make a search of the car at the time of the arrest. It would be strange indeed to say that the federal agent meant to induce an illegal search, when it appears that the search could very easily have been made lawfully by the state officer. At any rate, the mere giving of information we do not regard as requesting any action whatsoever, in the absence of an understanding, voiced or tacit, to that effect; much less do we consider it an instigation of an unlawful search.

Thus, it is submitted that for a raid by a foreign government to be converted into a joint venture with the United States, each of the three elements or acts of participation listed at the outset of this argument

must be present.[13] All of these three elements were present in the *Byars* and *Lustig* cases, *supra.* As seen from the *Evans* case, *supra,* the *Symons* case, *supra,* and the *Brown* case, *supra,* the presence of a federal agent at the raid by and of itself is not sufficient participation; however, this element is necessary if the second and most important element is to be present. The third element, receipt of evidence at the scene of the raid, standing by itself or in conjunction with the first element, is also apparently insufficient to convert the foreign government's raid into a joint venture under the rationale of the decision by the Ninth Circuit in *Symons* v. *United States, supra.* Moreover, the presence of the first two elements standing alone would apparently be meaningless, as the Supreme Court pointed out in *Lustig, supra,* that it is only the evidence secured by the federal agent through his participation in the involved raid which is inadmissible under the Fourth Amendment; to this effect, the Court stated (p. 79): "Evidence secured through such federal participation is inadmissible. * * *."

Accordingly, the issue as to whether the federal government participated in the instant raids by the Philippine Government must be determined by whether

[13] (1) The presence of a federal agent at the time and place of the raid; (2) the examination and selection by the federal agent, prior to seizure, of the evidence seized in the raid according to its suitability for use in a federal prosecution; and (3) the possessing of the seized evidence by the federal agent at the time and place of the raid and his retention of exclusive possession thereafter of the seized evidence for use in a subsequent federal prosecution.

all three of the above types of acts were committed by a federal agent with respect to these raids.

**II. The following findings by the trial court should not be set aside as clearly erroneous as they are supported by clear and convincing evidence; (A) the raids were conducted by the Philippine authorities as a result of their investigation which began prior to any contact with federal tax officials; (B) that no United States official requested or instigated the raids by the Philippine officials; and (C) that no United States official participated in the raids by the Philippine authorities**

**(1) Evidence supporting findings**

Jose Diokno, who was the Secretary of Justice of the Philippines at the time of the raids, specifically testified that the Philippine Government had the taxpayers under investigation long prior to Mr. Chandler introducing the informer Spielman to the Philippine authorities; that the raids were the culmination of this investigation; and that the United States Government did not request and had nothing to do with these raids. (Pltf. Ex. 12, pp. 14, 38, 44, 52–53, 129, 145.) This is corroborated by the fact that Colonel Lukban of the NBI, prior to being introduced to the informer Spielman, approached Mr. Chandler between Christmas of 1961 and January 7, 1962, and asked him to divulge certain information relative to the taxpayers which he (Colonel Lukban) knew Mr. Chandler to possess. (Tr. 463–465.) Accordingly, it must be concluded that the Philippine authorities had the taxpayers under investigation prior to Mr. Chandler and

Mr. Hawley introducing the informer Spielman to them.[14]

Secretary Diokno also testified he himself authorized these raids (Pltf. Ex. 12, pp. 27–31, 47–48), after consulting with the President of the Philippines (Pltf. Ex. 12, pp. 45–46). This is verified by the testimony of taxpayers' own witness, Major Del Rosario, who said that Secretary Diokno made all the decisions concerning the raids and that Colonel Lukban and the NBI carried out the details of the raids. (Tr. 834, 902.) Major Del Rosario also said this investigation concerned violations of Philippine laws. (Tr. 848, 901.)[15] Secretary Diokno stated that he did not receive any request from Mr. Chandler to authorize raids (Pltf. Ex. 12, pp. 19, 43–44), nor did he receive any such request from Mr. Seigenthaler, who was the aide, of Attorney General Kennedy whom Secretary Diokno met in Hong Kong[16] (Pltf. Ex. 12, p. 44). Mr. Chandler has also specifically denied ever requesting Colonel Lukban of the NBI, Secretary Diokno, or any

[14] In fact, the culmination of this investigation was not the raids but deportation proceedings brought against the taxpayers (Tr. 852–853), wherein evidence seized in the raids was used (Pltf. Ex. 12, p. 54), and which resulted in the taxpayer's deportation from the Philippines (Tr. 1215, R. 45).

[15] Although the testimony of taxpayers' witness, Major Del Rosario, has not been cited in their opening brief, it is anticipated that appellants may refer to his testimony in their reply brief. Accordingly, that witness' testimony is analyzed in the Appendix, *infra*.

[16] In fact, at this meeting, Secretary Diokno requested Mr. Seigenthaler to help in the form of the services of some tobacco experts (Pltf. Ex. 12, pp. 25–26, 61–62), which help was never received (Pltf. Ex. 12, pp. 26, 169).

other Philippine official, to authorize or conduct the raids. (Tr. 470, 979, 989.) Accordingly, it must be concluded that the finding of fact, to the effect that the raids were not requested or instigated by any United States authorities is supported by clear and convincing evidence.

With respect to the finding that no federal official participated in the raids conducted by the Philippine authorities, it is very important to note that the raids began at 1:00 p.m. on the afternoon of March 3, 1962 (Tr. 396, 909), they were simultaneous (Tr. 864), they involved 200 NBI officials (Tr. 906), and they were directed at 32 different premises (App. Br. 3),[17] owned either by the taxpayers or by corporations controlled by the taxpayers (R. 45). After the raids were underway, Secretary Diokno testified that he went to the NBI headquarters to await a report on the results of the raids and that he remained there until 5:30 p.m., on March 3d (Pltf. Ex. 12, pp. 38–40); he further testified that at 5:30 p.m., he went to the Columbia Club for some coffee and that within 15 minutes (between 5:45 p.m. and 6:00 p.m.), he received a report from an NBI agent as to the results of the raids (Pltf. Ex. 12, p. 40). Thereupon, Secretary Diokno, together with Colonel Lukban of the NBI, visited the various raided premises (Pltf. Ex. 12, pp. 41–42); and he did nothing further on this matter after 9:00 or 10:00 p.m. (Pltf. Ex. 12, pp. 41–42).

At no time prior to 10:00 p.m., on March 3d, had Robert Chandler or his aides seen any NBI officials,

[17] "App. Br." references are to to the Appellants Brief.

although he tried to several times. (Tr. 1017–1018.) From 1:00 p.m. in the afternoon until 10:00 p.m. on March 3d, Robert Chandler stayed in the vicinity of the NBI headquarters, because Colonel Lukban said (Tr. 378)[18] * * * if we waited over there, eventually he would make records available to us." At 5:00 p.m., on the afternoon of March 3d, Mr. Chandler read of the raids in the Manila newspapers. (Tr. 1015–1016.) Finally, after 10:00 p.m., Mr. Chandler went to Colonel Lukban's office. (Tr. 1017–1018.) In Colonel Lukban's office, Mr. Chandler and Mr. Ragland saw a large quantity of records and were given to understand that the raids were over (Tr. 400–401, 1019) and that all of the raided premises and records were

[18] Mr. Chandler's testimony as to securing the cooperation of Colonel Lukban is as follows (Tr. 989):

Q. Between those dates did you ask any Philippine official if you could have any records which they may secure from the raids?

A. Well, yes, after I found out that the Secretary [Diokno] had decided to go ahead with the raids, I did go to Colonel Lukban and ask him if we could take a look at what he might obtain during the raids.

Elsewhere, Mr. Chandler testified (Tr. 1005):

Q. You already had an agreement with Colonel Lukban that he would give you records?

A. Colonel Lukban had indicated that he would make the things available to us.

And further, Mr. Chandler testified (Tr. 271):

Q. Mr. Chandler, weren't you given, or told, the position you should take during the raid, where you should be physically located?

A. Yes. But that was in response to our request that we be given an opportunity to have access to what was obtained in the raids after they had obtained it.

The Court: Who did you make that request to?

The Witness: Colonel Lukban.

in NBI custody. Mr. Chandler asked at this time if he could copy the seized records and Colonel Lukban refused, saying that the records had to be inventoried and catalogued.[19] (Tr. 1019, 1143, 425–426.) At this time Mr. Chandler has done nothing with respect to the raids, although they have occurred 9 hours previously at 1:00 p.m. It therefore must be concluded that he did not participate in the making and execution of the raids.[20]

Likewise the evidence is clear that Mr. Chandler did not participate in the planning for the raids. Mr. Chandler admits that the informer Spielman met NBI

[19] The following day, Sunday, March 4th, Colonel Lukban again refused Mr. Chandler's request to copy records, saying that the records still had to be inventoried. (Tr. 425–426.)

[20] The taxpayers claim that Mr. Chandler did participate in the actual raids in that he left Colonel Lukban's office after the 10:00 p.m. meeting and went to the main office and a warehouse of the United States Tobacco Corporation and examined some corporate records. (App. Br. 68–74.) This contention and the evidence relative thereto is examined in detail at pages 64 and 67 of this brief, wherein the findings proposed by the taxpayers are examined and the inconsistencies alleged by the taxpayers to exist in the trial court's findings are analyzed. Suffice it to say here, that the raids and seizure of records had been accomplished prior to Mr. Chandler proceeding to the premises of the United States Tobacco Corporation at 11:00 p.m., at Colonel Lukban's request, for the sole purpose of helping the NBI agent with respect to some corporate records in the custody of the NBI by virtue of a seizure effected hours earlier. (Tr. 1019–1022, 1140–1148.) Further, approximately 10 hours had elapsed from the outset of the raids at 1:00 p.m. and Mr. Chandler's acts at 11:00 p.m., and Secretary Diokno had already obtained a report on the raids at approximately 5:30 p.m., and had visited various of the raided premises. (Pltf. Ex. 12, pp. 40–42.)

officials at his house (Tr. 146, 273–274) but he testified that this was because Spielman, being fearful for his life, refused to be seen entering any NBI office, and the NBI deeming the United States Embassy to be an inappropriate meeting place, Mr. Spielman requested Mr. Chandler to allow him [Spielman] to meet the NBI officials in Mr. Chandler's house (Tr. 139–141, 148, 471–472). Colonel Lukban of the NBI desired to keep Mr. Spielman's movements and whereabouts secret (Pltf. Ex. 12, p. 22), so he agreed to Mr. Spielman's request (Tr. 148) and Mr. Chandler agreed (Tr. 472) because of his friendship with Colonel Lukban (Tr. 71–72). Mr. Chandler testified that he was not even present at all of these meetings at his house. (Tr. 997–998.) Further, he testified that these meetings were basically between the NBI officials and Mr. Spielman (Tr. 149, 998) and that his only function at these meetings was to explain Mr. Spielman's statements to the NBI (Tr. 366, 320).[21] With respect to Mr. Chandler's 30-minute visit to Colonel Lukban's house on March 2nd, the day before the raids (Tr. 1005–1008), Mr. Chandler emphatically denied that he wrote or dictated any instructions to NBI officials regarding the raids (Tr. 328–330), or that he participated in any planning of the raids there (Tr. 320). He testified that, other than the premises known as the Army-Navy Club premises, he did not know how

[21] Both Mr. Spielman and the NBI officials spoke English but with different accents and often misunderstood one another. (Tr. 460, 373.)

many or which premises the NBI were planning to raid. (Tr. 1010.)

The foregoing evidence clearly shows that ~~the~~ No United States official participated in the Philippine raids within the meaning of that term, as defined by *Byars* v. *United States, supra; Lustig* v. *United States, supra,* and the other cases cited in Argument I of this brief. Accordingly, it must be concluded that the trial court's finding of "no participation by United States officials in these raids" is not clearly erroneous but is supported by substantial evidence.

**(2) There are no inconsistencies between the court's ultimate and intermediate findings of fact**

The appellants claim that the trial court's ultimate finding of fact is in conflict with nine of the trial court's intermediate findings of fact. (App. Br. 44–46.) The first allegedly conflicting intermediate finding of fact alleged is that some meetings were held in Robert Chandler's house to determine the *modus operandi* of the raids. (App. Br. 45.) These meetings are styled by taxpayers' counsel as meetings between United States and Philippine officials. Actually, these were meetings between NBI officials and the informer Spielman. (Tr. 121, 149, 998.) These meetings occurred in Mr. Chandler's house because Mr. Spielman, being fearful for his life, refused to be seen entering the NBI premises (Tr. 139–141, 472), and requested the meetings with the NBI officials [21a] to be held in Mr.

[21a] Colonel Lukban agreed to this request because he wished to keep Mr. Spielman's movements secret. (Pltf. Ex. 12, p. 22.)

Chandler's house (Tr. 148, 472).[22] Mr. Chandler acqui-

[22] With respect to the reasons why Mr. Chandler's was chosen as the place for the meetings, Mr. Chandler testified as follows (Tr. 471, line 20, through 472, line 11.):

Q. All right. What arrangements were made? Who said anything with regards to future arrangements to meet at your house?
A. Well, they came to the point where they [NBI] did want to talk to Spielman, to get his story down more fully, and they discussed where they would meet.
Q. You say "they"; who is "they"?
A. Colonel Lukban and Danny. I think it was all Colonel Lukban talking at that time. Then, of course, this informer was very much in fear of his life, and he would not go to a Philippine Government office, and they didn't seem to think it would be appropriate to come to the embassy. So Mr. Spielman suggested or asked if [it] would be possible for them to meet at my house. And Colonel Lubkan indicated it would be agreeable to him and I acquiesced to it. I don't remember that the particular date was set at that time.

Thus, it can be seen that it was Mr. Spielman who asked that the meetings be held at Mr. Chandler's house and he did so out of fear for his life. Mr. Chandler, at page 149 of the trial transcript, admits that, at some of these meetings at his home between the NBI and Mr. Spielman, there were discussions as to possible locations of the raids, but he also stated that he was not directly concerned with these discussions as "the discussions of this type were primarily between Spielman and the NBI people." (Tr. 149, lines 16–17). Again at page 990 of the trial transcript, Mr. Chandler testified with respect to these meetings as follows (Tr. 990, lines 22 through 991, line 15):

Q. All right, what was the topic of these discussions?
A. Well, initially they interviewed Spielman and let him tell his story. Then they questioned him about it based upon information they had. What was your question exactly?
Q. What was the topic of these discussions?
A. Oh. the topic. Well, the topic was Spielman's story on the Stonehill operations.
Q. Were raids ever discussed?
A. Well, there came a time, yes, that they began talking with him, asking him about locations, and what they might find at different places.
Q. Did you take part in any of these discussions?

esced in this both because he was on friendly terms with Colonel Lukban of the NBI (Tr. 72) and because he wished to keep the informer cooperative and available in the event that federal tax agents were assigned to investigate this matter. It should be further noted that prior to any contact with the NBI, the informer Spielman met with Mr. Hawley and Mr. Chandler at Mr. Chandler's office or Mr. Spielman's home. (Tr. 112–113.) Further, it should be noted that Mr. Chandler was not even at all the meetings at his house between the informer and NBI officials (Tr. 997–998), and that when he was present, he took no active interest in their conversations leaving the informer and the NBI personnel generally alone (Tr. 998). There is not one shred of evidence to show that Mr. Chandler ever did any planning of any raids at his home.

The second and sixth so-called inconsistent intermediate findings of fact are the suggestion of Robert

---

A. Well, when they got to this type of thing, Spielman was telling them what to do and sometimes I acted as mediator.

Q. Between whom?

A. Between Spielman and the NBI agent.

With respect to his role as mediator, Mr. Chandler testified that quite a lot of friction developed between the NBI and Spielman (Tr. 1057), and Spielman had difficulty explaining things to the NBI (Tr. 366, 373). Further, Mr. Chandler testified that Mr. Spielman was a pestering (Tr. 356), domineering (Tr. 458), very bitter (Tr. 459) man who had difficulty communicating with the Philippine officials, as they very often misunderstood him because of his accent which was very different from the Philippine accent (Tr. 460, 373). Spielman was born and lived in Czechoslovakia until World War II, when he served in the United States Army and was naturalized (Pltf. Ex. 11, p. 1), whereas the Philippines spoke Tagalog among themselves (Tr. 1006–1007).

Chandler that the premises of the Army-Navy Club be included in any list of premises to be raided, and his comment as to a warrant looking all right. (App. Br. 45–46.) These acts of Mr. Chandler occurred at a meeting at Colonel Lukban's house on the evening before the raid. (Tr. 1007, 1009.) On the night of March 2, 1962, Mr. Chandler was at home with Mr. Spielman when he received a visit from a Mr. Nocon, an aide to Colonel Lukban; after Mr. Spielman left Mr. Chandler's house, Mr. Nocon said that Colonel Lukban wished to see Mr. Chandler. (Tr. 1005–1006.) Mr. Chandler thereupon went to Colonel Lukban's house, arriving about midnight, and found there a large group of NBI agents speaking the Tagalog language. (Tr. 1005–1007.) When he arrived there, the NBI agents were standing around drinking soft drinks (Tr. 1007), and the gathering appeared social in nature (Tr. 305–306). At this time, Mr. Nocon started (or resumed) typing (Tr. 1007) and Colonel Lukban showed or read to Mr. Chandler a document which was described to him as a warrant and solicited his comments. (Tr. 306, 1007.) Mr. Chandler testified that he did not know anything about warrants, never having seen any before, and he quickly replied that it looked all right to him. (Tr. 1007, 306–313.) Mr. Chandler did not even know what kind of warrant it was. (Tr. 306–308.)[23] Mr. Chandler stated

[23] At the trial, Mr Chandler was shown one of the search warrants and the application therefor which were used in the raids, but he stated that this was not the type of thing shown to him at Colonel Lukban's on March 2d. (Tr. 1007–1008, 1010–1011.)

that he did not compose or draft the warrants or the applications for the warrants. (Tr. 316.) Also, Mr. Chandler stated that he did not know how many warrants there were or how many or what premises were going to be raided. (Tr. 1010.) Further, Mr. Chandler testified that, although he overheard some of the NBI personnel make references to the forthcoming raids, he did not answer any questions of the NBI team leaders concerning the raids (Tr. 308–309), and that he neither gave advice nor made any requests to Colonel Lukban concerning the raids (Tr. 1009.) However, Mr. Chandler stated that, out of curiosity, he asked Mr. Nocon if the room rented by Karl Beck[24] at the Army-Navy Club was included in the places to be raided; when Mr. Nocon said "No", Mr. Chandler said he thought any raids should include those premises. (Tr. 1009–1010, 317–318.) Mr. Chandler stated that the reason he made this comment was because of what the informer Spielman had told the NBI and himself. (Tr. 319.) This was not an order or directive or even addressed to Secretary Diokno or Colonel Lukban, the men who decided on the raids and who planned the raids, respectively. (Pltf. Ex. 12, p. 52; Tr. 902.) The visit of Mr. Chandler to Colonel Lukban took but 30 minutes, after which Mr. Chandler went home. (Tr. 1008–1009.) Finally, it should be noted that Mr. Chandler testified that he never was given any explanation as to why Colonel Lukban had requested that he come to his house. (Tr. 1008.)

[24] See footnote 8, *supra*.

Mr. Chandler's comment on the document identified only as a warrant can only be taken for what it was, a passing comment on something about which Mr. Chandler had no knowledge. He was not an expert on warrants nor did he hold himself out to be one; he had never seen a warrant before. (Tr. 1007.) Mr. Chandler specifically testified that he did not compose or draft these warrants (Tr. 316) and he testified that they must have been typed even before he arrived at Colonel Lukban's (Tr. 319). Accordingly, this casual remark cannot be deemed to be any meaningful participation in the raids or in the preparation for the raids; and therefore this fact noted by the trial court cannot be deemed to be inconsistent with the trial court's ultimate finding of no participation.

Likewise, Mr. Chandler's remark to Mr. Nocon that he thought that the Army-Navy premises should be included in any raid was but a reminder to a lower echelon NBI employee of what the informer Spielman had already told them. This remark did not even involve premises in the names of the taxpayers but rather was about a room rented in the Army-Navy Club under the name of Karl Beck (Tr. 695), an executive of the Industrial Business Management Corporation (Tr. 666), which was one of the Philippine corporations being investigated by the Philippine authorities for violations of Philippine law (Deft. Ex. AW). There is nothing to show that this reminder by Mr. Chandler had any specific connection to any United States investigation. On its face, it was germane only to the Philippine investigation and Mr.

Chandler took no steps beyond reminding Mr. Nocon of what the informer had said. Accordingly, this fact cannot be deemed to be inconsistent with the trial court's ultimate finding of no participation.

The third, fourth and fifth allegedly conflicting intermediate findings of fact concern Defendants' Exhibits I and J, which pertain to the Philippine corporations known as the United States Tobacco Corporation and the Evening News.[25] Defendant's Exhibit J is a diagram listed as the premises of the Goodrich [26] Building, containing offices of the Evening News. Defendants' Exhibit I is described as a memorandum but actually it consists of a collection of notes arranged in numerical order, many of which are simply "no comment". The third, fourth and fifth intermediate findings which are described as conflicting with the trial court's ultimate finding of "no participation" are that Defendants' Exhibits I and J and are in the handwriting of Robert Chandler and that these exhibits came into the possession of the NBI at some time or other. (App. Br. 45.) Taxpayers argue that these two exhibits are instructions by Mr. Chandler to the NBI as to how to conduct the raids. Mr. Chandler freely admitted that most of the handwriting on these two exhibits was his (Tr. 349, 360-361), but that some of the handwriting on Defendants' Exhibit J appeared to be that of others and that

[25] These two companies are Philippine corporations in which the taxpayers had an interest. (R. 45.)

[26] There are two different buildings with similar names—the Goodrich Building and the Goodyear Building. (Tr. 348.)

the diagram part was not his because he had never been to the buildings drawn thereon. (Tr. 360–363, 368–369, 1047.) He stated that he did not remember drafting these specific exhibits (Tr. 351, 363, 367, 370, 373, 1048) but that he did make such notes and drawings when interviewing the informer Spielman and he drafted such things at Spielman's request for the purpose of reducing Spielman's story to paper (Tr. 331, 351, 353, 356–357, 366, 368, 373, 1048–1049).[27] Mr. Chandler stated that the language in these two exhibits was Spielman's language (Tr. 353, 356, 358), and that all the information on these exhibits came from the informer Spielman and that he never had been to or made any personal investigation of the described premises himself. (Tr. 372–373, 1047.) Further, Mr. Chandler explained that he did not give these or like papers to anyone other than the informer Spielman (Tr. 351, 356–357, 358, 359, 1048–1049) and that he did not remember giving the exhibits to Colonel Lukban, the NBI, or Secretary Diokno (Tr. 352, 357, 1048–1049). Mr. Chandler further emphatically denied that he wrote anything at all when he visited Colonel Lukban's house the night before the raids. (Tr. 328–330, 1041, 1077.) There is absolutely no evidence in the record that these two exhibits were ever in the possession of the NBI other than the hearsay suggestion made by counsel for the appellants in his examination. (Tr. 349–357.)

---

[27] Also, he stated he helped Spielman reduce his story to paper because Spielman was often misunderstood by the NBI officials (Tr. 366, 1049), and there was a lack of rapport between Spielman and the NBI (Tr. 1048, 1049).

By no stretch of the imagination can these two exhibits be characterized as instructions or directions by Mr. Chandler to the NBI or to anyone else. The only logical explanation for Defendants' Exhibit I is that it contains responses to answers from a person being interviewed. This is clearly shown by the fact that this exhibit contains 20 numbered comments apparently tied into some picture folder. Of these 20 numbered comments, 8 of them (to-wit, 1, 3, 5, 6, 17, 18, 19 and 20) contain the notation "no comment"; and comments numbered 11, 12 and 13 merely state "Goodrich Bldg." These would be strange instructions to give any NBI personnel making raids. Also, the only items mentioned in these two exhibits which could be deemed to refer to evidence to be seized, are items consisting of—stamps, i.e., Philippine revenue stamps to be placed on cigarette packages made and sold by United States Tobacco Corporation; and rolls of cigarette paper described as newsprint which also pertain to the manufacture of cigarettes. (Deft. Exs. I, J.) These latter notations do not pertain to any evidence germane to any United States investigation, but are only pertinent to the NBI investigation which concerned counterfeit Philippine tobacco stamps, tobacco paper smuggled into the Philippines, and cigarettes on which the Philippine excise tax was not paid. (Pltf. Ex. 12, pp. 61–62; Deft. Ex. AZ.) Therefore, the taxpayers' contention that the existence of these two papers indicates some participation in the raids by the United States authorities and that these exhibits are inconsistent with the trial court's finding of no participation must be rejected as unfounded.

The seventh intermediate finding of fact cited by appellants is that the Philippine officials promised Mr. Chandler prior to the raids, that they would make available seized records. (App. Br. 46.) In this regard, Mr. Chandler testified (Tr. 989 lines 22–25):

> A. Well, yes, after I found out that the Secretary [Diokno] had decided to go ahead with the raids, I did go to Colonel Lukban and ask him if we could take a look at what *he might obtain during the raids.* [Emphasis added.]

Further, Mr. Chandler testified (Tr. 1005, lines 15–16):

> A. Colonel Lukban had indicated that he would make the things available.

Also, before any request was made of Colonel Lukban, Mr. Chandler attempted to dissuade Secretary Diokno from having any raids. (Tr. 985–986.)[23] Only after

---

[23] Mr. Chandler testified as follows (Tr. 985, line 16 through 986, line 17):

Q. Prior to this visit to Hong Kong did you have any knowledge of any raids or impending raids by the Philippine authorities?

A. Well, Secretary Diokno had spoken of them before the visit to Hong Kong. He had been sort of talking out loud at the time.

Q. When was that, when and where did he talk about it?

A. It may have been that evening that he was at the house. I wouldn't remember exactly where it was. I do remember that I——

Q. Did you say anything at that time to him?

A. Yes. I didn't like the idea of the raids, and I tried to dissuade him from it.

Q. Did you try to dissuade him from ever conducting a raid, or from——

A. No. I didn't know—I had no experience with a raid, but it gave me a bad reaction. I tried to dissuade him at least from rushing into it.

Q. Can you recall what you told him?

Secretary Diokno had decided upon having raids did Mr. Chandler address any request to Colonel Lukban about seeing anything obtained in the raids.[24] Further, this was not a request for Colonel Lukban to seize anything for Mr. Chandler but rather for Colonel Lukban to allow Mr. Chandler to see what the NBI had seized for the Philippine investigation in the raids. It should also be noted that Colonel Lukban did not agree or promise to do anything, but, rather indicated that he would permit Mr. Chandler to see what was seized in the raids. Also, it should be noted that Mr. Chandler did not even tell Colonel Lukban what type of records the United States was interested in until 10:00 p.m. on March 3d in Colonel Lukban's office, after the raids had been carried out and the records seized. (Tr. 321–327.)[25] Accordingly, this request of

---

A. Well, I was concerned, of course, about our case, the Internal Revenue possibilities, and I wanted particularly a Special Agent out there to know what effect all this would have on our case. So I think I probably put it on the basis of: At least wait until we know what happens to our case if you go ahead with this.

[24] Secretary Diokno did not even know that Colonel Lukban was cooperating with Mr. Chandler. (Pltf. Ex. 12, p. 158.)

[25] At the trial of this matter, Mr. Rand, counsel for the taxpayers read into the record some of the testimony from a deposition of Mr. Chandler taken in this case, and part of this reads as follows (page 325, line 7 to page 327, line 8):

The Court. What date was this?
Mr. Rand. This was after the raids, your Honor.
The Court. This is after the raids.
Mr. Rand. Well, I believe it is the day after the raids, yes.
The Court. Do you agree that this is after the raids?
Mr. McCarthy. I agree that this is after the raids. It is the night after the raids, actually, around 10:00 o'clock I believe the testimony is.
The Court. After the raids?
Mr. McCarthy. After the raids.

Mr. Chandler to Colonel Lukban does not constitute any participation in the raids conducted by the Philippine authorities.

The eighth intermediate finding cited by the appellants as being inconsistent with the trail court's ultimate finding is that Mr. Chandler and his two aids waited near the NBI headquarters on the day of the raid until the evening of the raid when they saw Colonel Lukban at his office and saw some of the seized records. (App. Br. 46.) Mr. Chandler did wait near the NBI main headquarters on March 3, 1962, the day

---

The COURT. Then we will agree. Go ahead.

Mr. RAND. (Reading)

"Q Who was there?

"A I don't remember outside of Joe.

"Q No Department of Justice officials or representatives there?

"A No, not that I remember.

"Q What did you say to Lukban and what did Lukban say to you?

"A Joe was feeling very jubilant.

"Q What did he say?

"A Something about 'We hit the jackpot. We really made it go,' or something like that. He was very excited, very jubilant. Of course I didn't know any of the details of what had happened at that time.

"Q What did you say to him?

"A 'Glad it went well,' and this type of thing.

"Q Did you ask him what he got?

"A Yes.

"Q Did you ask him whether he got anything that you would be interested in?

"A I think along about that time he showed me a couple of things out of the boxes in his office, and they were the type of things that we would be interested in.

"Q Did you make a request to see the documents that you wanted to see?

"A Yes.

"Q Did you tell him what you were looking for or did he know ahead of time what you were looking for?

"A No. I think it was probably about then we told him the type of thing we would be primarily interested in."

Mr. RAND. That was the night of the raids, your Honor.

of the raids (Tr. 1013–1018), but he did not talk to any NBI personnel until 10:00 p.m. that night when he talked to Colonel Lukban on the telephone (Tr. 1017–1018)[26] even though he had read of the raids in the newspapers earlier at 5:00 p.m. (Tr. 1015–1016). After talking to Colonel Lukban on the telephone, Mr. Chandler and his two aides went to Colonel Lukban's office where they saw Colonel Lukban who gave them to understand that he [Colonel Lukban] had hit the "jackpot" and that the raids were over. (Tr. 401.) In Colonel Lukban's office, they cursorily saw a large volume of records which Colonel Lukban said had been seized. (Tr. 1018–1019.) Mr. Chandler asked for permission to see and copy the seized records but Colonel Lukban refused saying that the records had to first be inventoried and catalogued by the NBI. (Tr. 1019, 1143, 425–426.) This episode is not an instance of participation by Mr. Chandler in any raids by the Philippine authorities, but to the contrary shows that Mr. Chandler stayed aloof from the NBI during the raids[27] and did nothing with respect to the seized records until the raids were over.

The ninth intermediate finding cited by appellants as being inconsistent with the ultimate finding of no participation in the raids is that the day following

[26] This is nine hours after the raids began at 1:00 p.m. (Tr. 396, 909.)

[27] During the day of the raids, at 1:00 p.m., Mr. Chandler deliberately refrained from going to one of the temporary buildings (arson squad building) used by the NBI, because he saw a large meeting of NBI personnel taking place there. (Tr. 1012.)

the raids arrangements were made to allow Mr. Chandler to copy the seized documents. (App. Br. 46.) On Sunday, March 4, 1962, Mr. Chandler saw Colonel Lukban and, for the second time since the raids, requested permission to copy the seized documents; Colonel Lukban refused to permit the records to be copied on March 4th as they had not been inventoried, but arrangements were made then for Mr. Chandler to come back to the NBI premises on March 5th, two days after the raids, and some of the seized records would be made available. (Tr. 426, 1036–1037.) Again, there is no participation by Mr. Chandler in any raid. Rather, this shows the lack of authority, association and influence which Mr. Chandler had with respect to the raids and to the things seized therein.

In view of the foregoing, it is submitted that the nine intermediate findings of fact enumerated [28] by the taxpayers in their brief are not inconsistent with the trial court's ultimate finding of no participation by any United States official in the raids conducted by the Philippine officials.

---

[28] On pages 53 through 54 of appellants' brief, a final inconsistency in the trial court's opinion is alleged wherein it is stated that the judge at the trial stated that he was going to have to find that there was participation. (Tr. 1243.) However, this quote from page 1243 of the trial transcript is truncated so as to present an apparent inconsistency. Actually, the trial judge at this point was discussing the statement contained in *United States* v. *Byars*, *supra*, at page 32, that "* * * mere participation in a state search of one who is a federal officer does not render it a federal undertaking * * *", and the trial judge was inquiring as to the quantum of participation by federal officers necessary to convert a search into a federal undertaking.

**(3) Appellants' proposed findings of fact are not supported by the evidence**

In urging that the trial court's finding of no participation by United States officials in the raids be set aside, the appellants advance the following proposed findings of fact: (a) there was no pending Philippine investigation prior to February or March of 1962 (App. Br. 56); (b) United States officials induced the Philippine authorities to make the raids (App. Br. 60); (c) Secretary Diokno's Hong Kong meeting was part of the participation by United States authorities in the Philippine raids (App. Br. 63); (d) the raids were planned in Mr. Chandler's house (App. Br. 64); and (e) Mr. Chandler actively participated in and supervised the raids. (App. Br. 65). In urging the adoption of these proposed findings, appellants have either ignored the evidence or have distorted it.

The first proposed finding is to the effect that there was no Philippine investigation prior to February or March of 1962. (App. Br. 56–60.) In support of this contention, the appellants cite pages 140 through 142 of the trial transcript. There is not one allegation on those pages which shows that there was not a Philippine investigation in existence prior to February 1962. Indeed, this contention completely ignores Secretary Diokno's testimony that there was such an investigation pending (Pltf. Ex. 12, pp. 14, 38, 52, 145) and it ignores the fact that early in January of 1962, Colonel Lukban requested information from Mr. Chandler concerning Stonehill (Tr. 463–465). Taxpayers also cite testimony on page 143 of the trial transcript as a basis for this contention. (App. Br.

59.) However, here again there is no statement that there was no investigation, only Colonel Lukban's response to the informer Spielman's request that action be taken against the taxpayers,[29] as is made clear on page 144 of the trial transcript. Accordingly, the contention of the taxpayers that there was no Philippine investigation pending before February of 1962 should be rejected.

The second proposed finding of fact advanced by the Taxpayers is that the United States officials induced the Philippine authorities to make the raids and, in support of their contention, reference is made to Defendants' Exhibits E and G, some unidentified testimony of Del Rosario, and Colonel Lukban's statements to Mr. Chandler on January 27, 1962. (App. Br. 60–62.) As to Colonel Lukban's statements on January 27, 1962, this was not a promise to Mr. Chandler but rather a promise to the informer Spielman. (Tr. 142–144, 995–996.)[30]

With respect to the alleged testimony of Del Rosario that Secretary Diokno briefed him on February 5th and that he only contemplated helping the

[29] The informer Spielman was bitter at the taxpayers who had beaten him and he was seeking the help of others to avenge himself on the taxpayers. (Tr. 442, 1089–1090, 1101–1102.)

[30] With respect to this statement of Colonel Lukban, Mr. Chandler testified (Tr. 144): "Actually I believe he was making that assurance to Mr. Spielman rather than to Mr. Hawley and myself." In this respect, Spielman was seeking to avenge himself on the taxpayers and this was Colonel Lukban's reply to Spielman's request; further, he stated (Tr. 995): "He stated to Spielman that he would check out his story, and if it checked out, that he would see that action was taken * * *."

Americans build a tax case (App. Br. 61), this is completely belied by Del Rosario's cross-examination wherein he states that he was introduced to Mr. Chandler in March of 1962 (at most two days before the raids) and at that time, he did not know what his duties were to be with respect to any liaison with Mr. Chandler nor did he know what the Stonehill case was about. (Tr. 887.) Also on cross-examination, Del Rosario admitted that his and the Philippine authorities' main interest in this matter was investigating Philippine crimes. (Tr. 901.) Finally, Secretary Diokno testified that he first advised Del Rosario of the Stonehill investigation on March 2, 1962, the day before the raid and, at that time, he told Del Rosario that the Philippine investigation had been going on for some years and that charges would be filed before the Deportation Board; but that he gave Del Rosario no other information at that time. (Pltf. Ex. 12, pp. 37–43, 115.) Secretary Diokno testified that he did not ask Del Rosario to help in the investigation of the taxpayers because of the need for secrecy and because Del Rosario possibly had some social contacts with the taxpayers. (Pltf. Ex. 12, pp. 97–100.) Secretary Diokno specifically negated the contention that the raids were carried out to assist the United States authorities but asserted that they were solely to establish violations of Philippine law (Pltf. Ex. 12, p. 52), and that he never received any requests from Mr. Chandler for help (Pltf. Ex. 12, pp. 19, 21, 43–44). Finally, there is Mr. Chandler's categorical denial that he asked the Philippine authorities to conduct the

raids for the United States tax case or that he participated in the raids. (Tr. 191, 268, 270–271, 319–320, 470, 979, 989.) Thus, the taxpayers' contention that the raids in question were instigated by or carried out at the request of the United States officials must be rejected.[31]

The third proposed finding of fact by the taxpayers is to the effect that Secretary Diokno's visit to Hong Kong to attempt to see Attorney General Kennedy somehow involved Mr. Chandler's participation in the raids. (App. Br. 63–64.) Secretary Diokno testified that he asked Mr. Hawley to attempt to arrange this visit (Pltf. Ex. 12, pp. 61–62; Tr. 155–156, 163–164) and that only when Mr. Hawley had trouble arranging it did Mr. Chandler give Secretary Diokno the name of the Chief of Security Police in Hong Kong, who put Secretary Dionko in touch with the Kennedy party in Hong Kong (Pltf. Ex. 12, p. 63; Tr. 163–164). Further, Secretary Diokno testified that he

[31] Taxpayers also claim that counsel for the United States have thwarted their efforts to prove this proposed finding of fact by not producing any reply to Mr. Chandler's memorandum of January 10, 1962 to his office (Deft. Ex. E), and various other unidentified correspondence. Every piece of relevant correspondence, memoranda, cablegrams, etc., whose existence has been identified in either the extensive discovery conducted on behalf of the taxpayers or at the trial have been produced and are in evidence. (Deft. Exs. A, B, D, E, F, G. AZ; Pltf. Exs. 1, 11; Tr. 95–96, 231–236, 241–242, 257–258, 976–978.) Taxpayers claim that Mr. Chandler must have received an answer from his office to Defendants' Exhibit E by January 27, 1962, the date of Mr. Chandler's meeting with Colonel Lukban (App. Br. 61); however, Mr. Chandler stated that he had not received any answer even as of February 12, 1962 (Deft. Ex. G; Tr. 130).

attempted to see Attorney General Kennedy and did see his aide, Mr. Seigenthaler, for the purpose of obtaining, at Philippine Government expense, the services of tobacco experts for use in the Philippine case (Pltf. Ex. 12, pp. 25–26, 61–63), but that he did not get any commitment from Mr. Seigenthaler and he never received the requested help (Pltf. Ex. 12, pp. 26, 169). Taxpayers refer to Defendants' Exhibit AZ as showing some sort of United States participation in the raids. Actually, this exhibit clearly shows that the Hong Kong visit was solely for the purpose of obtaining aid for the Philippine investigation. This exhibit is a cablegram back to the United States from Mr. Seigenthaler in which he reports that he met Secretary Diokno, that Secretary Diokno stated that the Philippine authorities had uncovered a huge fraud by the taxpayers concerning the Philippine tobacco industry and involving the forging of Philippine tobacco revenue stamps; further, Mr. Seigenthaler reported that Secretary Diokno requested the use of American tobacco experts and other help from the United States Government. Certainly, this meeting has nothing to do with the participation by United States officials in any raids.

The fourth finding of fact proposed by the taxpayers is to the effect that the raids were planned in Mr. Chandler's house. (App. Br. 64–65.) Messrs. Chandler and Hawley introduced the informer Spielman to Colonel Lukban of the NBI on January 27, 1962, at the United States Embassy in Manila, Philippines; the actual meeting itself was arranged by Mr.

Hawley. (Tr. 139–143, 1205.) The meeting occurred in the United States Embassy because Spielman was afraid for his life and would not be seen entering the NBI headquarters. (Tr. 141.) In this regard, it should be remembered that Spielman had received a beating from the taxpayers. (Tr. 99, 1101.) After this first meeting, the question arose as to where subsequent meetings between Spielman and the NBI should occur, and Spielman requested that they be at Mr. Chandler's house because he was still afraid of being seen at the NBI building. (Tr. 472.) This was agreeable to Colonel Lukban, who desired to keep the informer's movement sand whereabouts secret (Pltf. Ex. 12, p. 22); and Mr. Chandler acquiesced in this request (Tr. 472). Mr. Chandler stated that after January 27, 1962, the meetings at his house were between Spielman and NBI personnel (Tr. 146, 149, 998) and that he [Chandler] did not even attend all of them (Tr. 997–998). Mr. Chandler testified at length that he did not plan any raids either at his house (Tr. 149) or at Colonel Lukban's house (Tr. 320). The fact that the NBI officials may have interrogated Spielman at Mr. Chandler's house in their planning of the raids does not mean that Mr. Chandler planned the raids. Accordingly, this finding by the taxpayers should also be rejected.

The fifth finding of fact proposed by the taxpayers is that Robert Chandler participated in and supervised the raids by writing Defendants' Exhibits I and

J,[32] by his visit to Colonel Lukban's house and seeing there the search warrant on the evening of March 2, 1962, by commenting during that visit that the Army-Navy Club should be included in any raids, and by going to the premises of the United States Tobacco Corporation at the request of the Philippine authorities at 11:00 p.m. on March 3d, and pointing out to them the significant corporate records from an accounting viewpoint. As stated before in this brief,[33] Defendants' Exhibits I and J are not instructions at all, and they concern things germane only to the

---

[32] With respect to Defendants' Exhibits I and J, taxpayers quote Mr. Chandler as stating that he did this to help with the raids. (App. Br. 65.) The quote is taken out of context and actually is (Tr. 366, line 13 through line 23):

Q. * * * Do you know [sic] recall writing those words?

A. I don't recall preparing it.

Q. Does this language recall to you that you did give instructions to the NBI prior to the raids or advice?

A. Well, I did relay some—did help Spielman get some of his information to them, because they didn't understand each other.

Q. And you did this to help with the raiders, is that correct?

A. I presume that would probably be used in the raids, yes.

Mr. Chandler also testified that he did not remember when these exhibits were written (Tr. 351, 363, 367, 370, 373, 1048), but that he wrote such things for Spielman (Tr. 331, 356–357, 366, 373, 1048–1049) and he did not give any such written papers to the NBI (Tr. 359, 1048–1049). Thus, it is seen that Mr. Chandler had no knowledge as to whether the NBI used these in the raids but he presumed that they may use such papers the same as they used the other information Spielman gave them.

[33] See pages 47 to 49, *supra*, of this brief.

Philippine tobacco and revenue stamp investigation.[34] Mr. Chandler testified that he reduced such things to writing at Mr. Spielman's request so as to relay it to the NBI. (Tr. 331, 351, 353, 356, 366, 368, 373, 1048–1049).

With respect to the visit to Colonel Lukban's house on the evening before the raid and his cursory perusal of the search warrant, this too has been analyzed earlier in this brief.[35] Suffice it to say that Mr. Chandler categorically denies that he helped the NBI agents compose the text of any such warrants or that he told them what his interest was in the matter, or that he was interested in any type of financial records. (Tr. 316.) Mr. Chandler states that he advised the Philippine officials after the raids on March 3d, and not before the raids, that the type of records he was interested in were financial records. (Tr. 316–317.) More specifically, Mr. Chandler testified that he did not tell Colonel Lukban of the type of evidence he was interested in until 10:00 p.m. on March 3d after the raids had taken place. (Tr. 325–328.) Finally, it should be noted that the warrants actually used or the applications for the warrants are not what were shown to Mr. Chandler at Colonel Lukban's house. (Tr. 344–345, 1007–1008, 1010–1011; Deft. Exs. H, N.)

As for Mr. Chandler's suggestion that the Army-Navy Club premises be included in the raid, this was

[34] Compare the notations on Defendants' Exhibits I and J with Secretary Diokno's description of the Philippine investigation set forth in Defendants' Exhibit AZ.

[35] See page 44, *supra*, of this brief.

no more than a suggestion as he could not direct the NBI to do anything.[36] Further, the testimony of Mr. Chandler shows that this was nothing more than a suggestion or comment prompted by curiosity of what the informer Spielman had told both the NBI personnel and Mr. Chandler. (Tr. 319.)[37]

---

[36] See pages 45 to 47 of this brief wherein this episode is analyzed at length.

[37] The testimony concerning this suggestion is as follows (Tr. 319, line 8 through 320, line 21) :

The COURT. May I ask you a question: Why did you tell him to include the Army-Navy Club?

A. Spielman had referred to the Army and Navy Club in one of his very—in one of the earliest interviews that we had with him, and it intrigued me, and when—we hadn't really covered the situation too thoroughly, but when we went down to the basement of Colonel Lukban's house, Danny sat down immediately and started typing, and I don't know whether it was he or that Colonel Lukban said it, but they advised me that he was typing warrants, but he didn't type long, so evidently most of it had been done before, and then he said, "Well, that finishes it," and he made a count, I don't recall at the moment what the count was, but I suppose more out of curiosity because of my original curiosity of the Army-Navy Club, I asked him did that include the Army-Navy Club.

The COURT. Well, now, this morning I believe it was you testified that you did not participate or any of your helpers did not participate in the raid.

A. That is right, sir.

The COURT. All right. I want to go one step further. Did you participate in the preparations for the raid?

A. Well, perhaps to this extent: This man Spielman, the informer, was a very unusual individual and he had no confidence, trust in the Filipinos, and he was not understood by them; he was overbearing, he was a very unusual character, and he quite often would come to me and say that "They don't understand me, if you would talk to them," and so I would sometimes try to express what Spielman was trying to tell them.

The COURT. Well, now, are you trying to tell me that you participated in the planning of this raid?

A. No.

The COURT. Well, if you didn't participate in the planning, why did you tell them to include the Army and Navy Club?

A. Because the location intrigued me. It was——

Counsel for the taxpayers also state that Mr. Chandler supervised the raids by observing the raid of taxpayers' premises as well as Stonehill's office in the former Cuban Embassy, and selecting records for the United States tax investigation at a warehouse of the United States Tobacco Corporation while a raid was in progress. Nowhere in the record is there any evidence that Mr. Chandler supervised and directed any raids of the Cuban Embassy or any other of the taxpayers' premises. Taxpayers cite pages 393 to 394 and page 400 in support of this contention. (App. Br. 68.) On pages 393 to 394, it is revealed that Mr. Chandler left his two assistants waiting for Colonel Lukban near the NBI headquarters and he visited Colonel Lashinsky, who was attached to the United States Embassy and who lived in the Carmen Dewey Apartments, near the former Cuban Embassy. Mr. Chandler admitted that, from this vantage point, he could see some activity next door, but there is no evidence connecting Mr. Chandler in any way with that raid. As for taxpayers' contentions that Mr. Chandler thereafter drove to other places where raids were in progress, the taxpayers rely on a citation to page 400 of the trial transcript. There is nothing on page 400 to support such a contention. Page 400 of the trial transcript contains an account of Mr. Chandler's visit with Colonel Lukban at 10:00 p.m., on March 3d; i.e., nine hours after the raids, which occurred at 1:00 p.m. Further, the testimony concerning this meeting is to the effect that Mr. Chandler was given too understand by Colonel Lukban that

the raids were over. (Tr. 401.) Thereafter, Colonel Lukban requested Mr. Chandler to go to the warehouse of the United States Tobacco Corporation and help his NBI men there segregate, from an accounting point of view, the more important corporate records. (Tr. 1021, 1142.) Mr. Chandler went to the corporation's warehouse with an NBI agent and he put aside a few corporate records. (Tr. 1020, 1142–1148.) Mr. Chandler and Mr. Ragland were at the warehouse for approximately one-half hour (Tr. 1024), and then Mr. Chandler visited the main office of that company for about five minutes (Tr. 1026). However, neither Mr. Chandler nor Mr. Ragland selected any records for the United States tax case, as contended by the taxpayers (App. Br. 68–69), and, as a matter of fact, they selected only an old corporate ledger and some supporting records which they left behind and never saw again (Tr. 1147–1149). This was not done to further any United States investigation but was done to help the Philippine authorities in their case. As Mr. Chandler testified, he reluctantly agreed to do this, but since he had already been refused access to the documents once, he thought he better cooperate with Colonel Lukban. (Tr. 1020.)

It is submitted that all of the instances of participation cited by the taxpayers involve conduct of the agents in either passing information to the Philippine authorities at least twelve hours prior to any raids, or acts of the United States officials which occurred at least nine hours after the raids and which

were performed at the request of and for the accom
modation of the Philippine authorities. Further, non
of the acts cited by taxpayers involve the selectio
by United States officials of evidence to be seize
at the scene of any raids for use in any United State
investigation, nor do any of these acts involve th
United States officials acquiring possession of evi
dence at the scene of the raids for use in subsequen
federal investigations. Therefore, none of the act
cited by the taxpayers lie within the definition o
participation, as defined by the cases cited in Argu
ment I of this brief.

**(4) Conclusion of Argument II**

As stated above, the so-called intermediate finding
of the trial court are not in conflict with the tria
court's utimate finding of no participation by Unite
States officials in the raids. Further, the acts of th
United States agents which the taxpayers argue con
stitute participation in the raids conducted by th
Philippine authorities either are not supported b
the record, or in fact are acts which occurred twelv
hours prior to the raids or ten hours after the raid
and do not involve United States officials being pre
ent at the time and place of the raids or selectin
any evidence at the scene of the raids for later use b
the United States. Accordingly, these acts do not co
stitute participation as defined in *Byars* v. *Unite*
*States, supra,* and *Lustig* v. *United States, supr*
It is further submitted that there is clear and co
vincing evidence in the record supporting the tri
court's findings that the raids in question were the cu

mination of a Philippine investigation and were not requested or instigated by the United States, and that no official of the United States participated in these raids. Therefore these findings cannot be deemed to be clearly erroneous.

It is axiomatic that the findings of fact of a trial court will not be set aside unless clearly erroneous. *Crescent Wharf & Ware.* v. *Compania Naviera de Baja Calif.,* 366 F. 2d 714, 718 (C.A. 9th); *McGuire* v. *United States,* 349 F. 2d 644, 646 (C.A. 9th); *Paul Sachs Originals Co.* v. *Sachs,* 325 F. 2d 212, 214 (C.A. 9th); *Coast Metals, Inc.* v. *Wall Colmonoy Corporation,* 315 F. 2d 416, 418 (C.A. 9th); *United States* v. *Grissler,* 303 F. 2d 175, 176 (C.A. 9th); Federal Rules of Civil Procedure, Rule 52(a). It is submitted, therefore, that the trial court's findings of fact should not be set aside but should be upheld by this Court and the trial court's order denying the motion to suppress should be affirmed.

**III. The exclusionary rule of evidence used to enforce the Fourth Amendment does not apply to the instant civil suit**

In order to deter overzealous federal law enforcement officials from infringing upon the rights of private individuals under the Fourth Amendment, the Supreme Court, acting in its supervisory role over criminal justice in federal courts, created the evidentiary rule that evidence obtained by federal officials in violation of a person's rights under the Fourth Amendment would not be used in a criminal prosecution of that person. *Elkins* v. *United States,* 364 U.S. 206; *Weeks* v. *United States,* 232 U.S. 383. This evi-

dentiary rule is not so applied, however, as to exclude the use of such evidence for impeachment purposes. *Walder* v. *United States,* 347 U.S. 62. If the accused took the stand in his own defense, the prosecution could then utilize such evidence so as to impeach the testimony of the accused.

In the criminal case entitled *Silverthorne Lumber Co.* v. *United States,* 251 U.S. 385, the Court stated (p. 392):

> The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all.

The *Silverthorne* case was relied upon in 1938 by the Court of Appeals for the First Circuit in *Rogers* v. *United States,* 97 F. 2d 691, as authority for holding the exclusionary rule of evidence to be applicable in a civil case.[35] However, since then, the language used in *Silverthorne* has been restricted, as the Supreme Court stated in *Walder* v. *United States, supra,* (p. 65):

> It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradic-

[35] See also the 1938 case of *Schenck* v. *Ward,* 24 F. Supp. 776 (Mass.), which followed the *Silverthorne* case, *supra,* and *Rogers, supra,* decision.

> tion of his untruths. Such an extension of the *Weeks* doctrine would be a perversion of the Fourth Amendment.

Further, Justice Goldberg stated, in a concurring opinion in *Cleary* v. *Bolger,* 371 U.S. 392 (p. 403): "* * * the effect of the Fourth Amendment in civil cases in the federal courts is not totally settled." Accordingly, it is submitted that the reliance placed upon *Silverthorne, supra,* by the First Circuit in *Rogers* v. *United States, supra,* is in error.

There is a line of cases involving forfeiture in which the exclusionary rule has been applied on the ground that the cases were quasi-criminal in nature. *Plymouth Sedan* v. *Pennsylvania,* 380 U.S. 693. Prior to the *Plymouth* decision in 1965, the lower courts split on the applicability of the exclusionary rule of evidence in forfeiture cases, according to whether they determined a forfeiture case to be quasi-criminal in nature.[39] Besides the forfeiture cases, there have been several other instances in which the courts have determined that a suit was quasi-criminal in nature and that the exclusionary rule of evidence was applicable.[40]

The number of civil suits which have been deemed not to be quasi-criminal in nature and which have considered the applicability of the Fourth Amendment

---

[39] The Supreme Court noted this conflict in its opinion in *Plymouth Sedan, supra.* at page 696.

[40] See: *Powell* v. *Zuckert,* 366 F. 2d 634 (C.A.D.C.), which was a proceeding to discharge a Government employee. See also: *Saylor* v. *United States,* 374 F. 2d 894 (Ct. Cl.), which likewise involved a proceeding to discharge a Government employee and which applied the exclusionary rule, citing *Powell* v. *Zuckert,* supra.

to civil suits are of limited number. See: *Rogers* v. *United States, supra; Schenck* v. *Ward, supra; Compton* v. *United States,* 334 F. 2d 212 (C.A. 4th); *Lassoff* v. *Gray,* 207 F. Supp. 843 (W.D. Ky.); *Militare* v. *Scanlon* (E.D.N.Y.), decided on March 9, 1966 (17 A.F.T.R. 2d 776); *United States* v. *Chase* (D.C.), decided on December 21, 1966 (67–1 U.S.T.C., par. 15, 733). The *Rogers* case, *supra,* and the *Schenck* case, *supra,* were not tax cases and, as stated before, they rested upon the broad and sweeping language of *Silverthorne Lumber Co.* v. *United States, supra.* In *Lassoff, supra,* which was an injunction suit, the court held that evidence obtained in an illegal raid could be used to impeach a taxpayer. In *Militare, supra,* the District Court for the Eastern District of New York held that a tax assessment could be based solely upon evidence obtained in violation of the Fourth Amendment, whereas in *Chase, supra,* the District Court for the District of Columbia held that a tax assessment could not be based solely upon such evidence. In *Compton* v. *United States, supra,* the Court of Appeals for the Fourth Circuit held that in a tax refund suit the United States could use evidence obtained in violation of a taxpayer's rights under the Fourth Amendment to impeach and rebut the contentions of the taxpayer, citing *Walder* v. *United States, supra.*

As held by the court in *Militare, supra,* the presumption of correctness attaching to a tax assessment is not based upon an inference of facts rooted in probability but rather is based on policy; and therefore, it is not germane to consider what evidence the tax

authorities considered in making the assessment. Taxpayers must rebut or overcome the presumptive correctness of an assessment in order to defeat the collection of taxes. *Brunton* v. *Commissioner,* 42 F. 2d 81 (C.A. 9th), certiorari denied, 282 U.S. 889; *United States* v. *Lease,* 346 F. 2d 696 (C.A. 2d). Under the rationale of *Compton, supra,* and *Walder* v. *United States, supra,* evidence seized in violation of the taxpayers' rights is admissible to impeach the statements of the taxpayers as contained in their pleadings filed herein and in such testimony as they may offer herein. As the Supreme Court in *Walder* has precluded the issue of the exclusionary rule as a shield to escape the obligation of truthfully testifying, it would be illogical to invoke this rule so as to preclude the Government from testing the verity of a taxpayer's statements as contained in a tax return or in his testimony in a trial on the issue of his tax liability.

Since the payment and collection of income taxes is not punitive or quasi-criminal in nature,[41] and since the

[41] Taxpayers argue (App. Br. 24) that since the instant case involves the 50% penalty imposed upon fraudulent tax returns, this suit is quasi-criminal in nature, citing *Boyd* v. *United States*, 116 U.S. 616; *Helvering* v. *Mitchell*, 303 U.S. 391; *Tovar* v. *Jarecki*, 173 F. 2d 449 (C.A. 7th); and *Lassoff* v. *Gray*, 207 F. Supp. 843 (W.D. Ky.). The *Boyd* case involved a forfeiture. *Tovar* v. *Jarecki*, *supra*, did not involve any income tax proceeding, but rather, the court in that case held that a suit to collect a 100% tax imposed upon the transfer of marijuana did not involve a tax statute, but a penal statute, and that, therefore, the Fourth Amendment and its exclusionary rule of evidence was applicable to a suit to collect such a tax. In the *Lassoff* suit, the trail court refused to enjoin the collection of an assessment based upon evidence seized in violation of the

central issue to be decided is the true facts underlying the taxpayers' denial of liability for the taxes assessed for the years involved, even if this evidence were seized in an illegal raid in which United States officials participated, it should be deemed admissible in the instant action with respect to the issue of the tax liabilities of the taxpayers for the years involved. Thus, it is submitted that the exclusionary rule of evidence used to enforce the Fourth Amendment should be held to be not applicable to the instant suit.

**IV. Taxpayers have not established standing to suppress any evidence**

It has generally been held that for a person to have standing to question the legality of a search or seizure, the person must claim: ownership in or a right to possession of the property seized, or the premises searched, or that he was legally present on the searched premises at the time of the search. *Jones* v. *United States,* 362 U.S. 257; *Hill* v. *United States,* 374 F. 2d 871 (C.A. 9th), certiorari denied, 389 U.S. 842; *Diaz-Rosendo* v. *United States,* 357 F. 2d 124 (C.A. 9th), certiorari denied, 385 U.S. 856. The United States raised in its opposition to taxpayers' motion to suppress the issue of the standing of the taxpayers to move to suppress all the evidence re-

---

Fourth Amendment and held that such evidence could be used to impeach the taxpayer. In *Helvering* v. *Mitchell, supra,* there was no question concerning the Fourth Amendment, but the court stated that this 50% penalty was not a punitive sanction but, rather, a remedial sanction to reimburse the United States for the expense of investigation and the loss resulting from the taxpayer's fraud.

ceived by the United States from the Philippine officials. (R. 36–37.) The trial court at the hearing on taxpayers' motion to suppress, stated that it was deferring the issue as to the standing until it first determined whether any United States officials had participated in the raids in the Philippines. (Tr. 722.) Inasmuch as the trial court determined that there was no such participation, it did not pass on the issue of standing. (R. 43–57.)

Many of the premises and records seized belonged to Philippine corporations which the taxpayers managed or in which they owned stock. (R. 45; Deft. Ex. AW.) In *Hill* v. *United States, supra,* the Court of Appeals for the Ninth Circuit expressly held that a sole stockholder of a corporation did not have standing, *per se,* to question the search and seizure of his corporation's premises and records and, in so holding, the Court quoted with approval *Lagow* v. *United States,* 159 F. 2d 245, 246 (C.A. 2d), certiorari denied, 331 U.S. 858, as follows (p. 873):

> "When a man chooses to avail himself of the privilege of doing business as a corporation, even though he is its sole shareholder, he may not vicariously take on the privilege of the corporation under the Fourth Amendment; documents which he could have protected from seizure, if they had been his own, may be used against him, no matter how they were obtained from the corporation. Its wrongs are not his wrongs; its immunity is not his immunity. * * *"

Accordingly, if it is found that United States officials participated in the raids in the Philippines and that the exclusionary rule of evidence, which is the sanction used to enforce the Fourth Amendment, is applicable to the instant civil suit, then the matter should be remanded, with appropriate instructions for a determination by the trial court as to the standing of the taxpayers to suppress the various items of evidence received by the United States from the Philippine officials.

## CONCLUSION

In view of the foregoing, it is submitted that the trial court's order should be affirmed as its findings of fact are not clearly erroneous but are supported by clear and convincing evidence. In the event that the findings of the trial court are set aside on the grounds that there was participation by United States officials in the raids in the Philippines, it is submitted that the trial court's order should be affirmed because the exclusionary rule of evidence does not apply to civil suits of the instant nature. It is further submitted that if the exclusionary rule of evidence is held to be applicable to the instant civil suit this matter should be remanded to the trial court with appropriate instructions to determine the stand-

ing of the taxpayers to suppress the evidence received by the United States from the Philippine officials.

Respectfully submitted.

MITCHELL ROGOVIN,
*Assistant Attorney General,*
LEE A. JACKSON,
JOSEPH M. HOWARD,
JOHN J. MCCARTHY,
JEROME H. FRIDKIN,
*Attorneys,*
*Department of Justice,*
*Washington, D.C. 20530.*

Of Counsel:

WM. MATTHEW BYRNE, JR.,
*United States Attorney.*

LOYAL E. KEIR,
*Assistant United States Attorney.*

APRIL 1968.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated: —— day of April, 1968.

JOHN J. MCCARTHY,
*Attorney,*
*Department of Justice.*

# APPENDIX

## Analysis of Testimony of Major Del Rosario

Although taxpayers did not lay any great emphasis or cite the testimony of their witness Major Del Rosario in their opening brief on this appeal, it is anticipated that they may in their reply brief. Accordingly, his testimony is being analyzed here so as to point out that no reliance should be placed on his testimony because of its inconsistencies and because of the lack of opportunity for the witness to observe the facts about which he was testifying.

At the trial level, the taxpayers alleged that Major Del Rosario worked with Mr. Chandler in the planning of the raids, meeting at the offices of the Department of Justice and the NBI, and at luncheons and dinners; and that Mr. Chandler told Major Del Rosario that he wanted vouchers, accounting forms and books of account. It was impossible for Major Del Rosario to work with Mr. Chandler in planning of the raids inasmuch as Major Del Rosario, himself, admitted upon cross-examination that he did not know of the imminence of the raids on March 3 until one or two days prior to this date. (Tr. 894.) Further, Secretary Diokno states in his deposition that he purposely did not advise Major Del Rosario as to the planned raids against Stonehill and Brooks until one day prior to the raids (Pltf. Ex. 12, p. 37), because he did not wish a leak concerning the planned raids and because Major Del Rosario was somewhat of a

playboy who moved in the same social circles as Stonehill and Brooks (Pltf. Ex. 12, pp. 97–99). Further, no reliance should be placed upon Del Rosario in this matter because of the confused nature of his testimony. This is witnessed, *inter alia,* by the fact that on direct examination, he stated that he first knew about the Stonehill matter when he was first introduced to Mr. Chandler (Tr. 831); however, later, on cross-examination, he stated that he became a liaison man between Mr. Chandler and Secretary Diokno prior to hearing about the Stonehill case (Tr. 887–888). Further, on cross-examination, Major Del Rosario was asked about his alleged meetings with Mr. Chandler prior to the raids and he stated that it was possible that he had met with Mr. Chandler two or three times, or maybe more, prior to the raids (Tr. 891.) Major Del Rosario did meet Mr. Chandler two or three times when Mr. Chandler accompanied Mr. Spielman to the Department of Justice to confer with Secretary Diokno (Tr. 892); and at these conferences, Mr. Chandler remained in the outer room awaiting the break-up of the conference (Tr. 892) and he passed the time of day with, and tried to elicit information from, Major Del Rosario (Tr. 916–917). Thus, the one or two meetings between Mr. Chandler and Major Del Rosario were not concerned with any planning for raids as Major Del Rosario knew nothing about them, but, in fact, were accidental meetings occurring while Mr. Chandler was awaiting the termination of certain conferences between Spielman and Secretary Diokno. Further, at these chance confrontations, Mr. Chandler fruitlessly tried to "fish" for information from the unknowing Major.

U.S. GOVERNMENT PRINTING OFFICE: 1968